with them. And a blacksmith and wheelwright shall be furnished by the United States. Such assistance shall also be rendered them in their agricultural operations, as the President may think proper.

ARTICLE 9.

In consideration of the exertions used by the friends and followers of General McIntosh to procure a cession at the Indian Springs, and of their past difficulties and contemplated removal, the United States agree to present to the Chiefs of the party, to be divided among the Chiefs and Warriors, the sum of one hundred thousand dollars, if such party shall amount to three thousand persons, and in that proportion for any smaller number. Fifteen thousand dollars of this sum to be paid immediately after the ratification of this treaty, and the residue upon their arrival in the country west of the Mississippi.

ARTICLE 10.

It is agreed by the Creek Nation, that an agent shall be appointed by the President, to ascertain the damages sustained by the friends and followers of the late General McIntosh, in consequence of the difficulties growing out of the Treaty of the Indian Springs, as set forth in an agreement entered into with General Gaines, at the Broken Arrow, and which

have been done contrary to the laws of the Creek Nation; and such damages shall be repaired by the said Nation, or the amount paid out of the annuity due to them.

ARTICLE 11.

All the improvements which add real value to any part of the land herein ceded shall be appraised by Commissioners, to be appointed by the President; and the amount thus ascertained shall be paid to the parties owning such improvements.

ARTICLE 12

Possession of the country herein ceded shall be yielded by the Creeks on or before the first day of January next.

ARTICLE 13.

The United States agree to guarantee to the Creeks all the country, not herein ceded, to which they have a just claim, and to make good to them any losses they may incur in consequence of the illegal conduct of any citizen of the United States within the Creek country.

ARTICLE 14.

The President of the United States shall have authority to select, in some part of the Creek country, a tract of land, not exceeding two sections, where the necessary public

buildings may be erected, and the persons attached to the agency may reside.

ARTICLE 15.

Wherever any stream, over which it may be necessary to establish ferries, forms the boundary of the Creek country, the Creek Indians shall have the right of ferriage from their own land, and the citizens of the United States from the land to which the Indian title is extinguished.

ARTICLE 16.

The Creek Chiefs may appoint three Commissioners from their own people, who shall be allowed to attend the running of the lines west of the Chatahoochy river, and whose expenses, while engaged in this duty shall be defrayed by the United States.

ARTICLE 17.

This treaty, after the same has been ratified by the President and Senate, shall be obligatory on the United States and on the Creek Nation.

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4. The Treaty of March 24, 1832, 7 Stat. 366, provides:

ARTICLE I. The Creek tribe of Indians cede to the United States all their land, East of the Mississippi river.

ARTICLE II. The United States engage to survey the said land as soon as the same can be conveniently done, after the ratification of this treaty, and when the same is surveyed to allow ninety principal Chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of by them. A census of these persons shall be taken under the direction of the President and the selections shall be made so as to include the improvements of each person within his selection, if the same can be so made, and if not, then all the persons belonging to the same town, entitled to selections, and who cannot make the same, so as to include their improvements, shall take them in one body in a proper form. And twenty sections shall be selected, under the direction of the President for the orphan children of the Creeks, and divided and retained or sold for their benefit as the President may direct. Provided however that no selections or locations under this treaty shall be so made as to include the agency reserve.

ARTICLE III. These tracts may be conveyed by the persons selecting the same, to any other persons for a fair consideration, in such man-

ner as the President may direct. The contract shall be certified by some person appointed for that purpose by the President, but shall not be valid 'till the President approves the same. A title shall be given by the United States on the completion of the payment.

ARTICLE IV. At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple, from the United States.

ARTICLE V. All intruders upon the country hereby ceded shall be removed therefrom in the same manner as intruders may be removed by law from other public land until the country is surveyed, and the selections made; excepting however from this provision those white persons who have made their own improvements, and not expelled the Creeks from theirs. Such persons may remain 'till their crops are gathered. After the country is surveyed and the selections made, this article shall not operate upon that part of it not included in such selections. But intruders shall, in the manner before described, be removed from these selections for the term of five years from the ratification of this treaty, or until the same are conveyed to white persons.

ARTICLE VI. Twenty-nine sections in addition to the foregoing may be located, and

patents for the same shall then issue to those persons, being Creeks, to whom the same may be assigned by the Creek tribe. But whenever the grantees of these tracts possess improvements, such tracts shall be so located as to include the improvements, and as near as may be in the centre. And there shall also be granted by patent to Benjamin Marshall, one section of land, to include his improvements on the Chatahoochee river, to be bounded for one mile in a direct line along the said river, and to run back for quantity. There shall also be granted to Joseph Bruner a coloured man, one half section of land, for his services as an interpreter.

ARTICLE VII. All the locations authorised by this treaty, with the exception of that of Benjamin Marshall shall be made in conformity with the lines of the surveys; and the Creeks relinquish all claim for improvements.

ARTICLE VIII. An additional annuity of twelve thousand dollars shall be paid to the Creeks for the term of five years, and thereafter the said annuity shall be reduced to ten thousand dollars, and shall be paid for the term of fifteen years. All the annuities due to the Creeks shall be paid in such manner as the tribe may direct.

ARTICLE IX. For the purpose of paying certain debts due by the Creeks, and to relieve them in their present distressed condition, the sum of one hundred thousand dollars, shall be paid to the Creek tribe, as soon as may be after the ratification hereof, to be applied to the payment of their just debts, and then to their own relief, and to be distributed as they may direct, and which shall be in full consideration of all improvements.

ARTICLE X. The sum of sixteen thousand dollars shall be allowed as a compensation to the delegation sent to this place, and for the payment of their expenses, and of the claims against them.

ARTICLE XI. The following claims shall be paid by the United States.

For ferries, bridges and causeways, three thousand dollars, provided that the same shall become the property of the United States.

For the payment of certain judgments obtained against the chiefs eight thousand five hundred and seventy dollars.

For losses for which they suppose the United States responsible, seven thousand seven hundred and ten dollars.

For the payment of improvements under the treaty of 1826 one thousand dollars.

The three following annuities shall be paid for life.

To Tuske-hew-haw-Cusetaw two hundred dollars.

To the Blind Uchu King one hundred dollars.

To Neah Mico one hundred dollars.

There shall be paid the sum of fifteen dollars, for each person who has emigrated without expense to the United States, but the whole sum allowed under this provision shall not exceed fourteen hundred dollars.

There shall be divided among the persons, who suffered in consequence of being prevented from emigrating, three thousand dollars.

The land hereby ceded shall remain as a fund from which all the foregoing payments except those in the ninth and tenth articles shall be paid.

ARTICLE XII. The United States are desirous that the Creeks should remove to the country west of the Mississippi, and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for

one year after their arrival at their new homes—Provided however, that this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please.

Article XIII. There shall also be given to each emigrating warrior a rifle, moulds, wiper and ammunition and to each family one blanket. Three thousand dollars, to be expended as the President may direct, shall be allowed for the term of twenty years for teaching their children. As soon as half their people emigrate, one blacksmith shall be allowed them, and another when two thirds emigrate, together with one ton of iron and two hundred weight of steel annually for each blacksmith.—These blacksmiths shall be supported for twenty years.

Article XIV. The Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the

boundaries of the Creek country West of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe; agreeably to the 3d section of the act of Congress of May 2,[28,] 1830, entitled "An act to provide for an exchange of lands with the Indians residing in any of the States, or Territories, and for their removal West of the Mississippi."

ARTICLE XV. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States.

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5. Treaty of February 14, 1833, 7 Stat. 417, provides:

Whereas, certain articles of a treaty were concluded at the City of Washington, on the 24th day of January one thousand eight hundred and twenty-six, by and between James Barbour, Secretary of War, on behalf of the United States, and the Chiefs and head-men of the Creek nation of Indians; by which it is agreed that the said Indians shall remove to a country west of the Mississippi river: and whereas the sixth article of said treaty provides as follows:—"that a deputation of five persons shall be sent by them, (the Creek nation) at the expense of the United States, im-

mediately after the ratification of the treaty, to examine the country west of the Mississippi, not within the limits of the States or Territories, and not possessed by the Choctaws or Cherokees. And the United States agree to purchase for them, if the same can conveniently be done upon reasonable terms, wherever they may select, a country, whose extent shall in the opinion of the President, be proportioned to their numbers. And if such purchase cannot be thus made, it is then agreed that the selection shall be made where the President may think proper, just reference being had to the wishes of the emigrating party." And whereas, the Creek Indians aforesaid, did send five persons as delegates, to explore the country pointed out to them by their treaty; which delegates selected a country west of the Territory of Arkansas, lying and being along and between the Verdigris, Arkansas, and Canadian rivers: and, to the country thus selected, a party of the Creek Indians emigrated the following year. And whereas certain articles of treaty or convention, were concluded at the city of Washington on the 6th day of May, A.D. one thousand eight hundred and twenty-eight, by and between James Barbour Secretary of War, on behalf of the United States, and certain chiefs and head-men of the Cherokee nation of In-

dians; by the second article of which convention, a country was assigned to the Cherokee Indians aforesaid, including within its boundaries some of the lands previously selected and claimed by the Creek Indians, under their treaty aforesaid. And whereas, the President and Senate of the United States, for the purpose of protecting the rights secured to the Creek Indians, by their treaty stipulations, and with a view to prevent collision and misunderstanding between the two nations, ratified and confirmed the Cherokee treaty, on the 28th day of May, 1828, with the following proviso: viz.—"*Provided, nevertheless,* that the said convention shall not be so construed as to extend the northern boundary of the perpetual outlet west, provided for and guaranteed in the second article of said convention, north of the 36th deg. of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river to the Creek Indians, who have emigrated or may emigrate from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians: And provided further, that nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of

Indians, by any treaty now existing and in force, with any such tribe or tribes." And whereas the said proviso and ratification of the Cherokee treaty, was accepted by the delegates of the nation, then at the City of Washington as satisfactory to them, as is shown in and by their certain instrument in writing, bearing date the 31st day of May 1828, appended to and published with their treaty aforesaid. But, afterwards, the Cherokees of Arkansas and many of those residing east of the Mississippi at the time that treaty was concluded, removed to the country described in the second article of their treaty and settled upon a certain portion of the land claimed by the Creek Indians under their treaty provisions and stipulations. And whereas difficulties and dissensions thus arose between the Cherokees and Creek tribes about their boundary lines, which occasioned an appeal to the President of the United States for his interposition, and final settlement of the question, which they were unable to settle between themselves. And whereas the commissioners of the United States, whose names are signed hereto, in pursuance of the power and authority vested in them by the President of the United States, met the chiefs and head-men of the Cherokee and Creek nations of Indians, in council, on the 29th ultimo; and after a full

and patient hearing and careful examination of all the claims, set up and brought forward by both the contending parties, they have this day effected an adjustment of all their difficulties, and have succeeded in defining and establishing boundary lines to their country west of the Mississippi, which have been acknowledged, in open council, this day, to be mutually satisfactory to both nations.

Now, therefore, for the purpose of securing the great objects contemplated by an amicable settlement of the difficulties heretofore existing between the Cherokee and Muskogee or Creek Indians, so injurious to both parties; and in order to establish boundary lines which will secure a country and permanent home to the whole Creek nation of Indians, including the Seminole nation who are anxious to join them, the undersigned commissioners, duly authorized to act on behalf of the United States, and the chiefs and head-men of the said Muskogee or Creek Indians, having full power and authority to act for their people west of the Mississippi, hereby agree to the following articles:

ART. I. The Muskogee or Creek nation of Indians, west of the Mississippi declare themselves to be the friends and allies of the United States under whose parental care and protection they desire to continue: and that they

are anxious to live in peace and friendship not only with their near neighbors and brothers, the Cherokees, but with all the surrounding tribes of Indians.

ART. II. The United States hereby agree, by and with the consent of the Creek and Cherokee delegates, this day obtained, that the Muskogee or Creek country west of the Mississippi, shall be embraced within the following boundaries, viz:—Beginning at the mouth of the north fork of the Canadian river, and run northerly four miles—thence running a straight line so as to meet a line drawn from the south bank of the Arkansas river opposite to the east or lower bank of Grand river, at its junction with the Arkansas, and which runs a course south, 44 deg. west, one mile, to a post placed in the ground—thence along said line to the Arkansas, and up the same and the Verdigris river, to where the old territorial line crosses it—thence along said line north to a point twenty-five miles from the Arkansas river where the old territorial line crosses the same—thence running a line at right angles with the territorial line aforesaid, or west, to the Mexico line—thence along the said line southerly to the Canadian river or to the boundary of the Choctaw country—thence down said river to the place of begin-

ning. The lines, hereby defining the country of the Muskogee Indians on the north and east, bound the country of the Cherokees along these courses, as settled by the treaty concluded this day between the United States and that tribe.

ART. III. The United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them.

ART. IV. It is hereby mutually understood and agreed between the parties to this treaty, that the land assigned to the Muskogee Indians, by the second article thereof, shall be taken and considered the property of the whole Muskogee or Creek nation, as well of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi: and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided for by their treaty with the U. S. dated May 9th, 1832, shall also have a

permanent and comfortable home on the lands hereby set apart as the country of the Creek nation: and they (the Seminoles) will hereafter be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves—which location will be selected for them by the commissioners who have signed these articles of agreement or convention.

ART. 5. As an evidence of the kind feeling of the United States towards the Muskogee Indians, and as a testimonal of the [their] gratification with the present amicable and satisfactory adjustment of their difficulties with the Cherokees, experienced by the commissioners, they agree on behalf of the United States, to furnish to the Creek Indians west of the Mississippi, one blacksmith and one wheelwright or wagonmaker, as soon as they may be required by the nation, in addition to those already employed—also, to erect shops and furnish tools for the same, and supply the smith shops with one ton of iron and two hundred and fifty pounds of steel each; and allow the said Creek Indians, annually, for education purposes, the sum of one thousand dollars, to be expended under the direction of the President of the United States—the whole of the above grants to be continued so long as

the President may consider them conducive to the interest and welfare of the Creek Indians: And the United States will also cause to be erected, as soon as conveniently can be done, four patent rail way mills, for grinding corn; and will immediately purchase for them twenty-four cross-cut saws. It being distinctly understood, however, that the grants thus made to the Creek Indians, by this article, are intended solely for the use and benefit of that portion of the Creek nation, who are now settled west of the Mississippi.

ART. VI. The United States agree that the improvements which the Creek Indians may be required to leave, in consequence of the boundary lines this day settled between their people and the Cherokees, shall be valued with as little delay as possible, and a fair and reasonable price paid for the same by the United States.

ART. VII. It is hereby agreed by the Creek nation, parties hereto, that if the saline or salt plains on the great western prairies, should come within the boundaries defined by this agreement, as the country of the Creek nation, then, and in that case the President of the United States, shall have the power to permit all other friendly Indian tribes to visit said salt plains and procure thereon and carry

away salt sufficient for their subsistence, without hindrance or molestation from the said Creek Indians.

ART. VIII. It is agreed by the parties to this convention, that the country hereby provided for the Creek Indians, shall be taken in lieu of and considered to be the country provided or intended to be provided, by the treaty made between the United States and the Creek nation on the 24th day of January, 1826, under which they removed to this country.

ART. IX. This agreement shall be binding and obligatory upon the contracting parties, as soon as the same shall be ratified and confirmed by the President and Senate of the United States.

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6. The relevant portions of the Treaty of August 7, 1856, 11 Stat. 699, provide:

ARTICLE V. The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agree-

ment; and it doth also, in like manner, release and fully discharge the United States from all other claims and demands whatsoever, which the Creek Nation or any individuals thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety, the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural operations under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five;

one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. The following shall also be excepted from the foregoing quitclaim, relinquishment, release, and discharge, viz: the fund created and held in trust for Creek orphans under the second article of the treaty of March twenty-fourth, eighteen hundred and thirty-two; the right of such individuals among the Creeks as have not received it, to the compensation in money provided for by the act of Congress of March third, eighteen hundred and thirty-seven, in lieu of reservations of land to which they were entitled, but which were not secured to them, under the said treaty of eighteen hundred and thirty-

two; the right of the reservees under the same treaty, who did not dispose of their reservations to the amounts for which they have been or may be sold by the United States; and the right of such members of the tribe to military bounty lands, as are entitled thereto under existing laws of the United States. The right and interest of the Creek Nation and people in and to the matters and things so excepted, shall continue and remain the same as though this convention had never been entered into.

* * *

ARTICLE VII. It being the desire of the Creeks to employ their own teachers, mechanics, and farmers, all of the funds secured to the nation for educational, mechanical, and agricultural purposes, shall as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties, shall also be paid to the same officer, whenever the general council shall so direct.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE CREEK NATION,
Petitioner,

vs.

C. W. McGHEE, *et al.*, as Members of and on the Relation of the Creek Nation East of the Mississippi,
Respondents.

No. 227

THE UNITED STATES,
Petitioner,

vs.

C. W. McGHEE, *et al.*, as Members of and on the Relation of the Creek Nation East of the Mississippi,
Respondents.

No. 247

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

CLAUDE PEPPER,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE CREEK NATION,
Petitioner,

vs.

C. W. McGHEE, *et al.*, as Members of and on the Relation of the Creek Nation East of the Mississippi,
Respondents.

No. 227

THE UNITED STATES,
Petitioner,

vs.

C. W. McGHEE, *et al.*, as Members of and on the Relation of the Creek Nation East of the Mississippi,
Respondents.

No. 247

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

This is the brief of C. W. McGHEE, RUBY Z. WEATHERFORD, JOHN V. PHILLIPS and JOHN WILLIAMS, as Members of and on the Relation of the Creek Nation East of the

Mississippi, in opposition to the respective petitions of "The Creek Nation" and of the United States for review by writ of certiorari of a judgment of the United States Court of Claims.

OPINIONS BELOW.

The opinion of the Indian Claims Commission (R. 87-92) is not reported. The opinion of the Court of Claims (R. 98-114) is not yet reported.

JURISDICTION.

The jurisdiction of this court rests upon Section 20 (c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U. S. C. 70 and upon 28 U. S. C. 1255. It is limited to review of "determinations of questions of law" by the Court of Claims.

STATEMENT OF THE CASE.

A restatement of the case is necessary because petitioners have so baldly misstated it. Ignoring the limitation of this Court's review to question of law, they take issue at every turn with factual determinations of the lower court.

Petitioner "The Creek Nation" fills the record with confusion by referring to itself interchangeably with the generic Creek nation, which occupied a vast domain in Alabama and Georgia prior to the 1830's and which petitioner also calls "The Creek Nation". No attempt is made to indicate to which petitioner is referring from time to time. This might be pardonable, since this petitioner claims the two are identical, were it not that the Court of Claims has determined that petitioner is actually "a political body of Creek Indians inhabiting the Creek reservation in Oklahoma", neither identical with nor the successor to the generic Creek nation. This being so, this petitioner's persistence in this confusing practice only clouds the record and begs a question it seeks to present.

Respondents are an identifiable group of Creek Indians, members or lineal descendants of members of the original Creek nation, appearing on the relation of "The Creek Nation East of the Mississippi", a body of members or descendants of members of the original Creek nation like themselves.

PROCEEDINGS BELOW.

After a long and unsatisfactory experience in dealing with Indian claims and referring many of them to the Court of Claims for adjudication, Congress in 1946 set up the Indian Claims Commission and gave it full authority to hear and determine all claims of "any Indian tribe, band or other identifiable group of American Indians" against the United States for injuries inflicted upon them by the United States.

Congress provided in this Act that the Commission should receive claims for a period of 5 years after the date of the approval of the Act (August 13, 1946) and no claim existing before such date, but not presented within such period, could thereafter be submitted to any court or administrative agency for consideration, or be entertained by Congress. In short, Congress designed in this Act to do full justice, as far as possible, to the American Indians for any wrong the United States may have inflicted upon them in the past. This was a humane Act, however long delayed, for which our country may justly be proud.

What is now the present case before this Court began as a proceeding filed with the Indian Claims Commission by the Creek Indians now living in Oklahoma calling themselves "The Creek Nation" on January 29, 1948, claiming damages for the taking of over 22 million acres of the lands of the real Creek nation located in what constitutes portions of the States of Alabama, Georgia and Mississippi, which the United States solemnly guaranteed to the Creek nation under the Treaty of 1790 and which the Creek na-

tion was required under duress to cede to the United States by the Treaty of 1814 without compensation. A trial of the issues on the merits was held on October 17 and 19 and November 16, 1949, and January 24, 1950, and arguments were heard on November 29, 1950.

On January 5, 1951, the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" filed a "Motion to Intervene", with a "Petition for Leave to Intervene" attached. (R. 45, 46) Thereafter on January 15, 1951, petitioner "The Creek Nation" filed its objections to this motion and on January 23, 1951, Petitioner, the United States, filed its objections. (R. 49, 59) On April 4, 1951, respondents, as members of and on the relation of the Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians, filed an "Amended Motion for Leave to Intervene", attaching a "Petition of Intervenors" and a "Statement of Specific Points of Law and Authorities in Support of Motion for Leave to Intervene." (R. 60, 64, 69) Objections to said amended motion were duly filed by Petitioner "The Creek Nation" of Oklahoma, on April 17, 1951. (R. 104) The amended motion was argued on April 18, 1951, before the Indian Claims Commission. Respondents filed a "Supplement to Statement of Specific Points of Law and Authorities in Support of Motion for Leave to Intervene" on May 14, 1951. On June 4, 1951, the Commission entered its Order denying the amended motion, and filed its *per curiam* opinion. (R. 86)

Thereafter, on respondents' motion an Order was entered noting in the record the change of the name of the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" to "The Creek Nation East of the Mississippi". (R. 93)

The grounds upon which respondents sought to intervene as parties petitioner in the proceedings below are stated in their amended Motion, Petition and Statements of Points and Authorities. (R. 60, 64, 69)

Respondents basic premise is that the injury inflicted by the United States in 1814 was to the Creek nation as then constituted and that the right to recover therefor belongs to that nation, to be enjoyed by all its members. Their position is that petitioner "The Creek Nation" of Oklahoma, whose membership is restricted to Creeks in Oklahoma, is not identical with or the full successor of the Creek nation, and that it improperly claims to be, thus denying rather than representing the rights of respondents. Respondents brought their amended motion to intervene on the relation of the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians" now "The Creek Nation East of the Mississippi", whose rolls are open to all those who can prove lineal descent from the members of the original Creek nation, as the appropriate way of assuring that the original Creek nation be in effect made the petitioner in the proceeding below, so that judgment may be entered in its favor rather than petitioner's. In appropriating for this judgment and providing for its distribution, Congress may then appropriately direct that rolls be created of all those now members by blood of the original Creek nation or succeeding to the rights of its members.

The position of the petitioner "The Creek Nation" of Oklahoma before the Commission supported by the Government was that it is identical with the original Creek nation existing in 1814 and theretofore, the successor to its rights, and solely entitled to recover for the injury. It further contends below that intervention was procedurally impossible before the Commission, that the motion was not timely, and that appellants are not members of a "tribe, band or other identifiable group" entitled under the Indian Claims Commission Act to have their claims determined by the Commission.

The reasons given by the Commission in its *per curiam* opinion for its denial of respondents' amended motion, may be summarized as follows:

1. Respondents are not members of a "tribe, band or other identifiable group" within the meaning of the Indian Claims Commission Act in that they do not have a "common claim".

2. Petitioner "The Creek Nation" has the exclusive right to prosecute the claim for the 1814 injury to the Creek nation.

3. The jurisdiction of the Commission does not extend to defining identity of the group entitled to recover on any claim placed before it.

September 4, 1951, respondents here filed Notice of Appeal with the Indian Claims Commission and duly perfected the appeal.

While the matter was pending before the Court of Claims, the Indian Claims Commission on the 22nd of April 1952, entered judgment against the United States in the amount of $1,769,940.00 in favor of petitioner "The Creek Nation" of Oklahoma (Subject to deductions of offsets, if any, to be determined).

On the 21st of May 1952 after the judgment of the Court of Claims reversing the Indian Claims Commission, a stay order was entered by the Commission pending the outcome of the proceedings in this court.

May 6, 1952, the Court of Claims unanimously reversed the decision of the Indian Claims Commission. The unanimous opinion of the Court of Claims, delivered by Judge Littleton, is summarized by the court at the conclusion of the opinion in the following language which so succinctly sets forth the holding of the court in support of the position of the respondents here that we ask indulgence to set it out as follows:

> "In summary, we hold first that it was within the power of the Commission to allow the motion to intervene and that under the circumstances of this case, the motion should have been allowed. Next, we hold that the Commission erred in holding that the petitioner-appellee has the exclusive right to prosecute

the claim here asserted. Although, as suggested by appellants, this decision of the Commission may have been premature; the record before the Commission and now before the court indicates, and we hold, that if there was an injury inflicted by the 1814 treaty, it was an injury to the Creek Nation as it was then constituted, and that any recovery for such injury should be for the benefit of all the descendants of that nation and not for the exclusive benefit of the organized tribe or nation in Oklahoma. (fol. 145) And, finally, we hold that in the event of an award for such an injury, it should be for the benefit of all descendants of the Creek Nation as it was constituted in 1814, and recognized by the United States in the treaty of cession of that year, the method of determining the identity of such descendants to be provided for by Congress in making an appropriation to pay the award. (*Indians of California* v. *The United States,* 98 C. Cls. 583, cert. den., 319 U. S. 764)

"The decision of the Indian Claims Commission denying appellants' motion to intervene is reversed and the case remanded to the Commission for further proceedings in accordance with this opinion." (R. 114)

Both the petitioner "The Creek Nation" of Oklahoma and the government present their petition for writ of certiorari to the Court of Claims here, both urging the same theory of the case, and both presenting here exactly the same arguments they made before the Court of Claims. Both totally ignore the evident intent of Congress through this remedial statute to give the maximum of redress to Indian groups who had been wronged by our government. Both totally ignore the clear purpose of Congress that all back Indian claims should be presented to and disposed of by the Indian Claims Commission with all possible dispatch, so that neither Congress nor the Court of Claims nor other courts would be burdened by such claims in the future. Both totally ignore the supervisory jurisdiction in these Indian claims cases over the Indian Claims Commission in the Court of Claims, a judicial tribunal long accustomed to such matters, and the fact that the statute

made the finding of the Court of Claims final as to all matters of fact. Both ignore the point that the findings of fact made by the Court of Claims in this case left this Court with the very narrow inquiry of whether the Court of Claims in its clear and salutary decision committed any error of law.

STATEMENT OF FACTS.

The following are the facts underlying this case as found by the Court of Claims with some amplification of details.

Respondents, C. W. McGhee, Ruby Z. Weatherford, John V. Phillips, and John Williams, are Creek Indians, descendants of Creeks who were members of the Creek nation of Indians on August 9, 1814, when by a certain treaty between the United States and the Creek nation the latter ceded to the United States a vast tract of land in what is now Alabama and Georgia, and members themselves by blood of that nation. (R. 64)

The original Creek nation of Indians, once known as the Muskogee Confederation was a great and powerful confederation of Indian tribes who were the aboriginal inhabitants of a large area in what is now the southeastern United States, including nearly all of Alabama and Georgia and parts of Florida and Mississippi. (R. 1, 64) On August 7, 1790, the Creek nation entered into a treaty of friendship with the United States, whereunder it placed itself under the protection of the United States, ceded certain lands to the United States, and in return was guaranteed all its lands within boundaries defined in that treaty. (R. 2, 65, 7 Stat. 35)

During the War of 1812, certain of the Creeks were persuaded to assist the British. Much the greater number of the Creeks remained loyal to the United States, and in fact, fought against the rebellious Creeks, incurring great casualties, much suffering, and serious losses. Finally, of course, with the assistance of the United States, the uprising was put down. (R. 4, 5, 6)

In purported retaliation for this incident, the United States sent its emissaries to complete a new treaty with the Creek nation under which, on August 9, 1814, the Creek nation was compelled, by duress and threats of force, to convey to the United States 23,267,600 acres of its domain without receipt of any consideration therefor. (7 Stat. 120) (R. 5, 65).

It is the claim of petitioner "The Creek Nation" of Oklahoma, as well as of respondents, that the taking of these lands by the United States under this treaty was an unfair imposition by the United States upon the Creek nation and inflicted an injury upon it for which recovery is authorized under the Indian Claims Commission Act. (R, 5, 6, 7, 8, 9, 10, 65)

Subsequent to this treaty, as the white settlers of the United States desired more and more room for expansion, it became the policy of the United States to move as many Indians as possible westward. (R. 66, 101, 102)

As the Commission found: "On January 24, 1826, 7 Stat. 286, the Creek Nation concluded a treaty with the United States by which it ceded an area of its domain located in Georgia and lying on the east side of the Chattahoochee river. A portion of the tribe wished to move west of the Mississippi river and the treaty provided (Art. 6) for a 'deputation of five persons' to select a country west of the river as a home for that part of the Creek Nation desiring to move west." (R. 66, 101) The area, located in what shortly became the Indian Territory and is now part of Oklahoma, was duly selected and a number of the members of the tribe migrated.

The pressure of the Federal Government on the Creeks to move westward continued. As the Commission found: "On March 24, 1832, 7 Stat. 366, by treaty of that date, the Creeks ceded 'all their land, East of the Mississippi river' to the United States. This treaty contained this provision (Art. XII):

> 'The United States are desirous that the Creeks should remove to the country west of the Mississippi,

> and join their countrymen there; and for this purpose it is agreed, that as fast as the Creeks are prepared to emigrate, they shall be removed at the expense of the United States, and shall receive subsistence while upon the journey, and for one year after their arrival at their new homes—Provided however, *that this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please.'* (Italics added.)

"Article II thereof required the United States to survey the ceded area and allowed 'ninety principal chiefs of the Creek tribe to select one section each, and every other head of a Creek family to select one half section each, which tracts shall be reserved from sale for their use for a term of five years, unless sooner disposed of by them.' Provisions were also made for taking a census of the persons making selections and for making selection of twenty sections for the benefit of orphan children of the Creeks. Article III authorized the sale of the selections, and Article IV provided:

> 'At the end of five years, all the Creeks entitled to these selections, and desirous of remaining, shall receive patents therefor in fee simple, from the United States.'

"Article XII of this treaty quoted above discloses the desire of the United States to move all Creeks west of the Mississippi river, and as an inducement to move, agreed to pay the expenses of removal, provide subsistence during removal and for a year after their arrival west. However, such removal was not compulsory as to individual Creeks, for the article, as shown above, contained the proviso 'that this article shall not be construed so as to compel any Creek Indian to emigrate, but they shall be free to go or stay, as they please.' " (R. 66, 101)

On February 14, 1833, the "Muskogee or Creek nation of Indians, west of the Mississippi" represented by "chiefs and head-men of the said Muskogee or Creek Indians, hav-

ing full power and authority to act for their people west of the Mississippi," entered into a treaty with the United States in which title to the territory in Oklahoma was confirmed and guaranteed by the United States. The treaty provided that these lands "be taken and considered the property of the whole Muskogee or Creek nation, as well as of those now residing upon the land, as the great body of said nation who still remain on the east side of the Mississippi." Only those settling in the territory have ever derived any benefit from these lands. Grants of money also agreed upon in the treaty were expressly stated to be "intended solely for the use and benefit of that portion of the Creek nation, who are now settled west of the Mississippi." (7 Stat. 417)

History does not record how many Creeks migrated to Oklahoma and how many remained in the Southeast, but it appears that the number staying behind was so substantial that it might fairly be said that the Creek nation was divided b ythe migration. (R. 66, 101, 102, 105, 106, 108, 110, 111, 112). After the migration treaties of 1825 (7 Stat. 237) of 1826 (7 Stat. 286) or 1832 (7 Stat. 366) and of the February 14, 1833 (7 Stat. 417), it is of historical significance to note that the greater portion of the Creek nation as of then remained "on the East side of the Mississippi" (Treaty of 1833 (7 Stat. 417)).

One needs only to check Parsons and Abbotts' census of the Creeks in 1832 in the National Archives, subsequent censuses of the Southeastern states and local land and birth records of the membership rolls of the "Creek Nation East of the Mississippi" to gain an idea of their great number. An accurate statement was made by the United States in its brief in the Court of Claims; namely, the majority of Creeks went west but *many* stayed behind and continued to live in and around their old homes. (Italics ours)

Today the respondents consist of many thousands of Creek Indians direct lineal descendants of the members of the Creek nation as it existed in 1814. In many places

they are congregated together in almost exclusively Creek Indian communities. Some years ago it was necessary that a community of these Creek Indians institute suit in federal court against the Superintendent of Education, the School Board, and the individual bus drivers of Escambia County, Alabama, who failed or refused to transport the Creek Indian school children. For many years, the Creek Indians living at Pearch Switch near Atmore, Escambia County, Alabama, have had their own school, known as "The Indian Consolidated School", attended exclusively by Creek Indians who are direct lineal descendants of members of the Creek nation of 1814.

The migrating Creeks formed an organization for the management of their affairs in the Indian Territory and were first called in treaties "the Creek tribe of Indians west of the Mississippi" (Treaty of August 7, 1856, 11 Stat. 699), sometimes simply "The Creek Nation" (Treaty of June 14, 1866, 14 Stat. 785) and later generally, in treaties and Act of Congress, "The Creek Nation in the Indian Territory" (Act of March 1, 1889, 25 Stat. 757; Act of June 28, 1898, 30 Stat. 495; Act of March 1, 1901, 31 Stat. 861; Act of June 30, 1902, 32 Stat. 500). All of these treaties and laws related to affairs of the Creeks in Oklahoma.

Congress in the Indian Appropriation Act of March 3, 1871, provided that "no Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty." Existing treaties were not impaired by the Act. This statute changing the policy of the government for nearly 100 years of entering into treaties of the various tribes of Indians within the geographical limits of the United States and simply established the status of the Indians as being a people subject to the laws of the United States. After this Act and the policy of the government implementing it, no Indian tribe, band or group in the United States

had the status of a nation. So, there is utterly no authority for the petitioners in this case to contend that the Creek Indians now living in Oklahoma are in fact the Creek Nation of 1814.

Commencing in the 1880s, in preparation for the admission of Oklahoma to statehood, it became the policy of the United States to do away with the local self-government of the tribes in the Indian Territory, as well as the communal ownership of lands by these tribes. By a series of laws commencing with the Act of February 8, 1887, Congress provided for eventual citizenship of the Indians who were members of these tribes and for the allotment of the tribal lands to the individual members. The Act of 1887, in granting citizenship to Indians leaving their tribes, expressly guaranteed the existing rights to tribal or other property of all Indians, including those who had theretofore left their tribes. (24 Stat. 388, Section 6).

In pursuance of the federal policy to extinguish tribal rights in lands in the Indian Territory a Commission to the Five Civilized Tribes was created by Act of March 3, 1893 (27 Stat. 645). By Act of June 10, 1896, this Commission was empowered and directed to make rolls of the citizens in the Indian Territory of these tribes to afford the basis of allotment of the tribal lands in the Indian Territory and division of tribal moneys arising from the sale of lands. (29 Stat. 321) This allotment was further implemented by the Act of June 28, 1898, which made additional provisions for enrollment and provided that, for the purpose of this allotment, "No person shall be enrolled who has not heretofore moved to and in good faith settled in the nation in which he claims citizenship." (30 Stat. 495)

A subsequent agreement of March 8, 1900, between the United States and "The Creek Nation in the Indian Territory," confirmed by the Act of March 1, 1901, prescribing further terms for the allotment of Creek lands in the Indian Territory, restricted enrollment to those persons

living in the Creek area in the Indian Territory. (31 Stat. 861.)

By Act of May 8, 1906, Congress re-affirmed its guarantee of the rights of Indians who had left their tribes and become citizens of the United States, amending the Act of February 8, 1887, to provide in part:

> "Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, *and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States,* and is entitled to all the rights, privileges, and immunities of such citizens, *whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property:* * * *
> "And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory. * * *" (Italics ours.) (34 Stat. 137.)

This series of agreements and Acts of Congress provided for eventual abolition of the jurisdiction of the Indian tribes over the local affairs of their members, and of the tribal title to lands, abolished the enforcement of tribal laws, did away with the power of the tribes to collect money for account of the members or for their account and in general diminished and provided for eventual aboli-

tion of the power and authority of the tribal organizations. All moneys awarded on claims to be distributed per capita to members or descendants of members of tribes are distributed directly to these members by the Secretary of the Interior. (Act of June 28, 1898, 30 Stat. 495) (R. 68)

As the Court of Claims found:

> "For certain limited purposes, the Creek nation West of the Mississippi retained and still maintains a tribal organization." (R. 104)

Respondents and the thousands of other Creeks they represent are descended from that portion of the Creek nation which remained East of the Mississippi. Because they possessed no territory and were not dealt with by the United States as a group, they did not retain a general tribal organization, although various groups of them have resided together in small close-knit communities and preserved their tribal ties and certain of their customs. (R. 60, 61, 62, 64, 66)

Respondents and other Creeks in the Southeastern States have recently joined together for their common benefit in an organization known first as the "Perdido Friendly Creek Indian Band of Alabama and Northwest Florida Indians"; its name has now been changed to "The Creek Nation East of the Mississippi" as more appropriate to its scope. The sole requirement for membership is that one be a lineal descendant of a member of the original Creek nation and be not enrolled in petitioner "The Creek Nation." (R. 64, 87)

SUMMARY OF ARGUMENT.

1. This Is Not An Appropriate Case For the Jurisdiction of This Court.

The two petitions present four basic questions. This court has no jurisdiction of one and questionable jurisdiction of another, and should not exercise jurisdiction of the two remaining.

The first issue sought to be presented is whether the Indian Claims Commission or the Court of Claims possesses jurisdiction to permit intervention. This is a purely procedural issue. Petitioner "The Creek Nation" argued to the Commission its own lack of authority to permit intervention; the Commission ignored the argument, assuming its power to grant intervention while denying intervention on the specific facts. The argument was renewed before the Court of Claims, which dismissed it. The Indian Claims Commission Act gives the Commission authority to make its own rules of procedure. Petitioner "The Creek Nation's" attempt to gain further review of its right to grant intervention seeks to have this Court overrule the Commission's own procedural rulemaking which is its exclusive prerogative under the statute.

Petitioners, in asking this Court to review the decision of the Court of Claims holding that the Commission had the power to permit intervention and under the facts of this case should have done so, completely overlook the supervisory jurisdiction of the Court of Claims over the Indian Claims Commission and the limitation of the power of review of this Court over the Court of Claims in cases arising under the Indian Claims Commission Act to determinations of questions of law. Section 20(e) of the Indian Claims Commission Act provides for an appeal to the Court of Claims from the determination of the Commission and then vests the Court of Claims with "exclusive jurisdiction to affirm, modify, or set aside such final determination."

The second issue tendered, in this instance by both petitioners, is whether the Court of Claims correctly decided that petitioner "The Creek Nation" is not identical with or the successor of the generic Creek nation which was injured by the United States in 1814. This issue is material because, if petitioner "The Creek Nation" and the generic Creek nation *were* identical in fact, it would be at least arguable that petitioner "The Creek Nation" has exclusive right to prosecute the claim in issue. Both petitioners argue

vehemently and extensively that this issue was wrongly decided. But the Court of Claims' conclusion of the lack of identity was not a determination of law; it was a pure decision of fact, which it was empowered to make because of its broad appellate jurisdiction over the Indian Claims Commission. This Court exercising a more limited review, confined to questions of law, has clearly no jurisdiction to review this determination.

Both petitioners ask this Court to review a third determination of the Court of Claims that respondents are representatives of a "tribe, band or other identifiable group of American Indians". The question is one of intermingled law and fact, and this Court's jurisdiction to review it is at least questionable. Moreover, as to this mixed question, the conflict between the Indian Claims Commission and the Court of Claims was not over the law, but over the construction of the facts. The Indian Claims Commission has consistently and correctly held, as it did in this case, that the requirement that claims be brought by identifiable groups is in substance a requirement that claimants have a "common claim of a group character" and be capable of identification. It simply misapplied this principle upon being presented with the instant case, failing to recognize that the basic claim presented was that of the generic Creek nation, and regarding respondents as presenting individual claims merely because, there being presently no comprehensive organization of the Creek nation, they were compelled to sue in a representative way. The Court of Claims corrected the Commission's misconception of the facts. There, therefore, exists no difference of principles between the two lower tribunals. No error and no conflict or confusion of authorities on a legal issue exists on this point to require this court's intercession.

Petitioner "The Creek Nation" alone urges this Court to review a fourth determination of the Court of Claims that the original Creek nation as it existed in 1814 is the tribal entity entitled to recover for the 1814 injury and that the

right to participate in its recovery descends to lineal descendants of its then members and not merely to those descendants placed on the rolls of petitioner "The Creek Nation" in Oklahoma in 1907.

Petitioner "The Creek Nation" has had no success with this issue before either lower tribunal. It argued before the Indian Claims Commission that respondents had forfeited their property rights in the claim in issue. The Commission failed to make this argument a ground of its denial of intervention, resting its decision on jurisdictional grounds. This petitioner renewed the argument before the Court of Claims, which expressly held that respondents possess equal rights with the members of petitioner "The Creek Nation", which have not been forfeited. The Indian Claims Commission and the Court of Claims, both practiced in dealing with Indian cases, having failed to respond to "The Creek Nation's" arguments on this issue, there appears little occasion for this court to consider it.

The Indian Claims Commission has been set up as an expert tribunal to hear Indian claims. The Court of Claims, because of its long experience in deciding Indian claims under special jurisdictional Acts, has appropriately been given a somewhat supervisory jurisdiction over the Indian Claims Commission and unusually broad powers of review. Ordinarily, therefore, it would appear unnecessary and inappropriate for this Court to make of itself a third level of determination in a field where the lower tribunals are specialists. We submit that this case does not present the exceptional circumstances which should be the requisite to further review.

2. This Case Was Correctly Decided By the Court of Claims.

The Indian Claims Commission Act was generous in its spirit and inclusive in its relief; the restrictions on the Commission's jurisdiction are not narrow and technical but broad and sensible.

The Indian Claims Commission Act was generous, equitable, remedial legislation. Congress showed the broad purpose to recompense all Indian groups which the United States had injured for all wrongs they had sustained, of whatever character. The purpose was not only generous but also inclusive—to make all Indian groups whole and heal all old wounds so that this persistent cause of discontent could be forever removed.

In doing so, Congress naturally recognized the physical limitations of the Commission as well as the fact that the basic wrongs were done by the United States dealing as a sovereign with Indian groups as entities. It, therefore, restricted the Commission's jurisdiction to group claims. It quite naturally also provided that these groups must be identifiable; otherwise, the Act would be completely unworkable. By definition an unidentifiable group cannot be identified so as to be the subject of an award.

The only limitation, then, is that claimants present a common claim of a group character and that the group be identifiable.

Petitioners wrongly seek to put the Act in a procedural straitjacket.

Petitioner "The Creek Nation" says first that the Commission has no authority to permit intervention. Thus, if one group claiming exclusive right to an Indian claim petitions the Commission, petitioner "The Creek Nation" would argue that a second group urging a right to all or a part of the same claim must bring a separate suit and cannot be permitted to pursue the sensible and efficient course of urging their claim by intervention in the first suit. This is a foolish argument. It defies a purpose of the Act, to dispose of all claims expeditiously, to permit all having an interest in the controversy to be heard and to settle Indian claims once and for all before the Indian Claims Commission with appropriate review under the Act rather than by separate Acts of Congress in the Court of Claims. There is little need to tell this Court that in federal tribunals

today the right to intervention without the need for statutory support is well recognized. Furthermore, power to grant intervention is implicit in Congress' general grant to the Commission of authority to make its own rules of procedure. It is absurd to suggest, as petitioner "The Creek Nation" has done, that the Commission was required to sit down and write out a rule authorizing intervention in order to enable itself to permit it.

Both petitioners next argue that claimant groups must be presently organized in order for the Commission to hear their claims. This is a patent misconstruction of the statute, which authorizes suits by the entity itself, where a group is organized, and by individuals in a representative capacity, where no present organization exists.

Petitioners also argue that a claimant group must have been recognized by the Secretary of the Interior in order to file a claim. Again this is a flagrant misconstruction of the clear meaning of the statute. The statute provides that where an organization exists "recognized by the Secretary of the Interior as having authority to represent such tribe, band or group" such organization shall have exclusive authority to represent that organized entity. This demonstrates Congress' intention that individual members of identifiable groups never recognized by the Secretary of the Interior can, on the otherhand, sue in a representative capacity.

Petitioner "The Creek Nation" also seeks to put the Act in a substantive straitjacket.

Avariciously claiming the right to the entire recovery for itself and its members, it tries to limit the class entitled to recover by anachronistic rules of Indian law and artificial tribal distinctions.

They claim descent of the claim follows tribal lines, in accordance with early Indian law. This law, created in a time when Indian life was communal, has no place in the decision of property rights today when tribal organizations are merely the skeletons of the governing authorities they

once were and communal holdings have all but disappeared. The dead hand of this ancient law should not rule the affairs of people living in a different age.

The rule of law petitioners urge ignores the statutes of 1887 and 1906 saving the rights of Indians living in tribes to become citizens.

The property right involved here is not a right to a share in communal lands but a right to share in statutory relief for a group injury granted by Congress in the Indian Claims Commission Act.

In enacting the Indian Claims Commission Act, Congress did not simply create a new tribunal to hear claims actionable under old rules of law, but created also, new rights—new rules of substantive law. It made actionable and remedial moral and equitable wrongs, and granted relief for them to the groups injured.

The Indian Claims Commission Act creates the legal right claimed by the parties here. It did not define this right, or the succession to it, in terms of ancient Indian law. It can hardly be presumed to have intended a succession so foreign to property concepts of the American common law.

Remedial legislation, to right a wrong or confer a benefit, should be broadly construed, in a manner which will carry out the humane and equitable purposes of Congress.

The rule of lineal per capita succession suggested by the Court of Claims is a fair and reasonable construction of the probable intent of the Congress as to the descent of group claims in cases where the original members of the injured group are dead.

ARGUMENT.

1. This is Not an Appropriate Case for the Jurisdiction of this Court.

There are four basic reasons why this Court should not take jurisdiction of this case.

A. The Indian Claims Commission Was Authorized Under the Statute to Permit Intervention and the Court of Claims by the Indian Claims Commission Act Was Empowered to Require the Commission to Permit Intervention; As It Did in This Case.

The clear scheme and purpose of the Indian Claims Commission Act of 1946 was to bring before the Indian Claims Commission all Indian claims not already pending in the Court of Claims or the Supreme Court of the United States where there could be a comprehensive consideration and adjudication of these claims and that all parties having an interest in the controversies presented could be heard and all claims not filed within the five years permitted by the Act should be thereafter barred from further consideration by any court, administrative agency or the Congress.

The legislative history of the Indian Claims Commission Act of 1946 reveals that Congress for decades has been troubled by Indian claims. Extensive hearings have been held requiring much attention of the Members of Congress and the Agencies of Government and many Indian claims have been referred by Acts of Congress to the Court of Claims. In 1946 the Congress, consistently with the Reorganization Act of that period, striving to bring about more efficiency in the functioning of the Congress, determined to clean up the troublesome subject of Indian claims. Congress, in this Act, set up a competent Commission, vested it with general authority to hear four specific categories of claims which might be presented, and finally in a fifth category opened the doors of the Com-

mission to "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity". In short, Congress determined in a comprehensive way to try to do full, if delayed, justice to the Indians of our country for any wrongs our government in the past may have inflicted upon them. It may be that this Act of our Congress is without parallel in history.

Congress fixed ten years or until such time as it should have filed its final report to Congress, as the life of the Commission. But, the Congress provided a period of five years from the date of the approval of the Act in which claims could be filed before the Commission and, as said, barred all claims previously existing and not filed with the Commission by that time. Not only was it the obvious purpose of Congress that all interested parties should have an opportunity to be heard when any claim was presented, but Section 17 of that Act specifically imposed a duty in that respect upon the Commission. Section 17 provided:

> "The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim."

Commenting upon this statute, Senator O'Mahoney from the Committee on Indian Affairs of the Senate, favorably recommending the passage of the Indian Claims Commission Act, said:

> "The interests of the Indian claimants in the investigations and determinations of the Commission are amply protected by the provisions of the bill *requiring notice to all possible claimants, and notice and opportunity for hearing to all interested parties before making findings on any claim,* and authorizing representation by attorneys." (Page 2, Report No. 1715, 79th Congress, Second Session, Calendar No. 1751, the Senate) (italics ours).

Naturally Congress contemplated that all parties having an interest in any controversy or claim presented to the

Commission should be heard and when an adjudication should have been made by the Commission, it should be final and binding.

In Section 22 (a) of the Act, it is provided:

> "The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."

And sub-Section (b) of Section 22 provided:

> "A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy."

Clearly, therefore, the respondents "The Creek Nation East of the Mississippi" were within the purview of the Act when they presented their petition to the Indian Claims Commission before there had been any final determination upon the claim of the so-called "The Creek Nation" of Oklahoma, asserted that they were an identifiable group of Creek Indians provable descendants of the Creek nation of 1814 with a Common Claim and asked to be heard.

Yet, both petitioners, ignoring the time, effort and money which would be saved by the Commission considering the claim of the respondent Creek Indians while it was passing upon the claim of the Oklahoma Creek Indians, both asserting a right of recovery under the Act against the United States for the taking of the lands of the real Creek Nation in 1814 without compensation, ask this Court to hold that neither the Indian Claims Commission nor the Court of Claims has the power under the Indian Claims Commission Act to allow these respondent Creek Indians to intervene and be heard in this case.

Not only does the whole tenor and purpose of the Indian Claims Commission Act and the Sections of the Act quoted contemplate that all parties having an interest in any given claim shall have an opportunity to be heard, but Section 9 of the Act specifically provides:

"The Commission shall have power to establish its own rules of procedure."

This general grant of authority to make its rules to the Commission does not require that the rules by which the Commission shall be guided shall be formulated into set and fast rules. What this Section means substantially is that the Commission shall establish the procedures by which it shall function. In this case when the claim of the respondents was presented, it was argued then as it has since been argued by petitioners, that the Commission had no power to permit the intervention requested. Nevertheless, the Commission did not deny the petition to intervene because it did not have power to permit the respondents to be made parties to the suit. On the contrary, the Commission went ahead and really ruled upon the merits of the petition of the respondents. The record discloses that the Commission wrote an opinion on the merits of the petition of respondents, embracing nearly four and a-half printed pages of the record, and holding that respondents are not members of a "tribe, band or other identifiable group" within the meaning of the Indian Claims Commission Act in that they do not have a "common claim"; that the petitioner "The Creek Nation" of Oklahoma has exclusive right to prosecute the claim for the 1814 injury to the Creek nation; and that the jurisdiction of the Commission does not extend to defining identity of a group entitled to recover on any claim before it. (R. 87, 88, 89, 90, 91, 92)

So, the Commission did receive, entertain and consider the petition of the respondents and actually made a final determination upon the merit of the claim presented by the respondents within the contemplation of the Indian Claims Commission Act and that final determination was the subject of respondents' appeal under the statutes of the Court of Claims, was considered and reversed by the Court of Claims.

So, it is extraordinary that petitioner should claim now in this Court that the Indian Claims Commission did not

have the power to permit respondents to intervene in this case in which they had for a claim a most substantial interest.

It is clear by reference to Section 20 of the Indian Claims Commission Act that the Congress conferred the supervisory jurisdiction over the Indian Claims Commission upon the Court of Claims, a court whose primary function is to adjudicate claims against the United States and which has had large experience in the handling of Indian claims referred to it by the Congress.

Section 20 (a) of the Indian Claims Commission Act authorizes the Commission at any time to certify to the Court of Claims any definite and distinct question of law concerning which instructions are desired for the proper disposition of a claim and makes it the duty of the Court of Claims to give appropriate instructions on the questions certified to the Commission for its guidance.

Sub-section (b) of Section 20 gives the right of appeal to the Court of Claims from "the final determination of the Commission". Then, the Act provides that the Court of Claims:

> • • • "shall have exclusive jurisdiction to affirm, modify, or set aside such final determination".

Sub-section (b) of Section 20 further provides that the Court of Claims:

> • • • "may at anytime remand the cause to the Commission for such further proceedings as it may direct, • • • "

not inconsistent with the provisions of Section 20. Nothing appears in Section 20 forbidding the Court of Claims to remand a cause to the Commission requiring it to permit the intervention of interested claimants in a given case.

After Congress conferred this broad and necessary authority for the expeditious adjudication of Indian claims upon the Commission and upon the Court of Claims, thereby relieving this Court of any duty except reviewing questions

of law decided by the Court of Claims, it is unthinkable that the Congress ever intended in the Indian Claims Commission Act, or this Court should burden itself with reviewing a decision by the Indian Claims Commission and the Court of Claims to hold that the respondents having presented their claim before the final determination of the case instigated by some other Creek Indians, "The Creek Nation" of Oklahoma and the respondents' claim being very pertinent thereto because it had a common origin with the claim of "The Creek Nation" of Oklahoma, should not be heard.

B. The Court of Claims Correctly Decided That Petitioner "The Creek Nation" of Oklahoma Is Not Identical With or the Successor of the Generic Creek Nation Which Was Injured by the United States in 1814 and, Therefore, Does Not Have the Exclusive Right to Sue Under the Indian Claims Commission Act for the Wrongs Done to the Creek Nation of 1814 by the United States.

Petitioners in this case, entirely overlooking that the basis of the claim of all Indians under the Indian Claims Commission Act of 1946 is a statutory grant to a class of people, so that the simple questions in any case are whether the claimants come within the intended class of beneficiaries and whether a case has been made out against the United States, have predicated their whole case upon the thesis, which they labor through page after page in their briefs, that what they call "The Creek Nation" meaning the aggregation of Creek Indians now living in Oklahoma under laws long ago enacted by the Congress, owning their property and having a social order as nearly as possible like that of other citizens of the United States, is in fact and technically the same Creek nation, the sovereign body of Indians from time to time making treaties with the United States and not subject at all to the statutes of the United States, living and occupying vast lands in Alabama, Georgia and Mississippi, in 1814.

This would seem to us to raise a simple question of fact. On this question of fact are the petitioners right or wrong?

The Court of Claims, having, under the Act, exclusive authority to make findings of fact in this matter has found against petitioners specifically.

The Court of Claims said:

> "For certain limited purposes, the Creek Nation west of the Mississippi retained and still maintains a tribal organization." (R. 104)

But the Court of Claims made it very clear that this is a new and distinct organization formed after the Creeks migrated to Oklahoma and is not the same Creek nation which was the victim of the wrong of the United States in 1814.

The Court of Claims said:

> "If an injury was inflicted by the United States in procuring and enforcing the Treaty of August 9, 1814, it was an injury to the members of the Creek nation with whom the Treaty was negotiated and who owned the land in question, and not merely an injury to the Creek Indians who (or whose heirs) later emigrated to the Indian Territory West of the Mississippi and formed a new and separate tribal organization for the purpose of holding and managing property awarded to them in the west." (R. 104)

And again the Court of Claims said:

> "The new Creek Nation was formed as a governing body to attend to the affairs and property of the Creeks in Oklahoma". (R. 108)

And still again spoke the Court of Claims:

> "If the eastern Creeks cannot intervene and become parties in the suit on this claim because, as a group, they have never been recognized by or participated in treaties with the United States, since 1832, then it would appear that the Creek Nation west of the Mississippi also would have no standing to sue because,

> as presently constituted, that nation was not a treaty party in 1814, when the property in question was ceded." (R. 110)

In fact, on page 15 of its brief, petitioner "The Creek Nation" admits that the Court of Claims found against it upon this fact. This petitioner says:

> "Construing the above provision and reviewing the history of the removal of the Creek Nation from its ancestral home in the east to lands in the west, the Indian Claims Commission held that the Creek Nation throughout history was an organized tribe of American Indians, recognized as such by the Secretary of the Interior, and under said Section 10 had the exclusive right to prosecute this Creek tribal claim against the United States. (R. 88-91)
>
> "The Court of Claims held that the Indian Claims Commission erred in this holding (R. 114). In arriving at this conclusion the lower court stated that the Creek Nation was split by emigration, and that that portion of the Creeks who settled west of the Mississippi River in Indian Territory, formed a new tribal organization for the holding of property and management of tribal affairs in Indian Territory, and that thereafter the United States dealt with this new tribal organization of Western Creeks with respect to property and affairs of those Creeks in Indian Territory only (R. 102, 103)."

It follows that if the predicate of the claim of the petitioner, "The Creek Nation", of Oklahoma, is a question of fact and that fact has been decided against petitioner by the Court of Claims and this Court is not given authority under the Act to review findings of fact by the Court of Claims, then the petitioner has no standing here and petitioners have no basis for invoking the jurisdiction of this Court.

If it were necessary to consider the matter it has been declared by the Congress and recognized by this Court that the Indian tribes existing in this country now are not the sovereign Indian nations with which our government at one time dealt through treaties.

We have already quoted in our statement the section in the Indian Appropriation Act of March 3, 1871 (16 Stat. 566, Section 71, Title 25 U. S. C. A.) providing:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty;" * * *

Quoting this section, this Court said:

> "The practice of dealing with the Indian tribes as separate nations was changed by proviso inserted in the Indian Appropriation Act of March 3, 1871. (Quoting the Act above set out.)
>
> "From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life." (Per Mr. Justice Brewer In The Matter of the application of Albert Heff, 197 U. S. 488, 25 S. Ct. 506, 508 (1904)

The Court of Claims then was clearly right in holding that the Creek Indians living now in Oklahoma in their present status, although having by governmental authority the right to enjoy certain tribal characteristics, is not the legal entity the real Creek Nation which the government wronged in 1814, and entitled, to the exclusion of all other identifiable Creek groups, to the right to sue the United States for the alleged wrong of 1814.

C. The Court of Claims Was Correct in Holding That the Respondents Are Representatives of a "Tribe, Band or Other Identifiable Group of American Indians" and Thereby Entitled to Present Their Claim Before the Indian Claims Commission.

The Indian Claims Commission itself has consistently held, as it did in this case, that an "identifiable group" of

Indians may bring before the Commission a claim under the Indian Claims Commission Act if they "have a common claim". (R. 91) The Commission did not decide that the respondents were not "an identifiable group". What the Commission said is this:

> "It is plain from the statements in the amended motion and the allegations of the petition accompanying it that the Perdido Band has no common claim, and is therefore not an 'identifiable group' under said Act." (R. 91)

The Commission simply misapplied or misconceived the facts in this case. It overlooked the fact that respondents were not suing as an aggregation of individuals, but as the statute authorized, as representatives of the generic Creek nation which did have a common claim against the United States for the wrong of 1814.

The Court of Claims very clearly dealt with this question and found as a fact that the Commission erred in its finding that the claim presented by the respondents was not "a common claim".

The heart of the case is in this finding and clear-cut treatment of the basic issues involved in this case by the Court of Claims, and we quote it:

> "On the basis of the above facts the Indian Claims Commission has determined that appellee has the exclusive right to prosecute the claim for the 1814 injury to the Creek Nation; primarily, because subsequent to 1832, when all territory of the Creeks east of the Mississippi was ceded to the United States, all dealings of the Federal Government were had with the Creeks in Oklahoma and at no time after that date did defendant ever recognize by treaty or otherwise, those Creeks remaining east as the Creek Nation. We are unable to agree with this holding. The land which is the subject matter of this suit was not land in Oklahoma, nor was it land concerning which the United States dealt exclusively with the Oklahoma Creeks. It was land located east of the Mississippi which was obtained by the United States in 1814 under a treaty with the

Creek Nation, all of whose members then lived east of the Mississippi, and whose identity as a tribe and whose ownership of the land ceded had been specifically recognized by the Treaty of August 7, 1890. If an injury was inflicted by the United States in procuring and enforcing the Treaty of August 9, 1814, it was an injury to the members of the Creek Nation with whom the treaty was negotiated and who owned the land in question, and not merely an injury to the Creek Indians who (or whose heirs) later emigrated to the Indian Territory west of the Mississippi and formed a new and separate tribal organization for the purpose of holding and managing property awarded to them in the west. It is true that the Creek Nation west of the Mississippi has been recognized by the United States as a political organization for the purpose of dealing with their land and affairs in the Indian Territory. If such Western Creeks have a right to make a claim for the injury to the eastern land in 1814, it is not, we think, by virtue of such later recognition nor because their names or the names of their ancestors appear on the roll completed on March 4, 1907. That Creek roll was made up for the specific purpose of alloting in severalty to Oklahoma Creeks the land owned by the tribe in Oklahoma. We believe that the rights of the Western Creeks to sue for the injury arising out of the cession of the eastern land in 1814, arise rather by virtue of the membership of their ancestors in the tribe recognized by the United States in 1814 as the owner of that land, and that those rights are in no way superior to nor different from the rights of the descendants of all members of the Creek Nation as it was constituted at the time the 1814 treaty was executed. The maintenance or lack of maintenance of tribal relations and the occurrence or non-occurrence of acts of recognition of a tribal organization of the Creek Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814. Any claim for an injury to the Creek Nation of 1814, is a claim belonging, if at all, to the descendants of all the members of that Nation whether they live east or west of the Mississippi, and whether organized or not, recognized or not, subsequent to that date." (R. 104, 105)

No difference in principle, therefore, exists between the Commission and the Court of Claims and no point of law is presented to this Court requiring it to enter into this matter.

The legislative history of the Indian Claims Commission Act makes it clear that the respondents, being an identifiable group of people have a common claim, are entitled to present their claim to the Indian Claims Commission.

The first bill leading to the enactment of the present Indian Claims Commission Act of 1946 was Senate Bill S-2731, 74th Congress, First Session. This bill later passed the Senate, but did not pass the House. The title of this bill was "A Bill to Create an Indian Claims Commission, to Provide for the Powers, Duties, and Functions Thereof, and for Other Purposes".

Section 2 of this bill provided:

> "It shall be the duty of the Commission to investigate all claims against the United States of any Indian tribe, band, or other *communal group* of American Indians residing within the territorial limits of the United States of (sic) Alaska" * * * (Italics ours)

Mr. John Collier, the Indian Claims Commissioner at the time, testified before the Senate Committee on Indian Affairs upon this bill on June 17, 1935. Senator Steiwer asked Mr. Collier "What is the significance of the word 'communal' "?

Mr. Collier replied:

> "It simply mean a community. It is an attempt to go beyond the limitations of the meaning of 'band', which has been imposed by this single definition, and to take a simple group of Indians who have a common injury, but who may not heretofore have been recognized by any branch of the Government.
>
> "There is a big group of Indians, the Croatans, as they are called, down in North Carolina. It is not certain that they could qualify as a band, because never heretofore has the Government recognized them in any way; yet there are thousands of them. They are a communal group."

Senator Steiwer inquired:

> "Do you feel if you used the word 'group' without any qualifying word you would take in more territory than you would want to take in?
>
> "Mr. Collier: You might, because that might throw you over to the people who have made themselves into a group, a lot of individual claimants who had formed themselves into a group merely in order to get into this court.
>
> "Senator Steiwer: Yes; a small, miscellaneous group.
>
> "Mr. Collier: Yes, because I doubt if there is a case anywhere where an Indian has a claim that he cannot find another Indian that has that kind of a claim. It would be merely the lumping of that kind of claims. We do not want these innumerable, heterogeneous Indian claims put on the doorstep of the court if we can help it. Some qualifying word—maybe 'communal' is not the right word—which indicates a historic identity, or an identity of habitat, makes the thing a communal group, a group with historic identity, and not just a detached group of people who got together and made out they were a group so as to get into this court.
>
> "Senator Steiwer: The essential thing is that they have a common claim, is it not?
>
> "Mr. Collier: Yes; a common claim of a group character". (Hearings before the Committee on Indian Affairs, United States Senate, 74th Congress, First Session on S. 2731, June 10 and 17, 1935, page 40)

We see here the broad meaning which was intended to be given to the term "communal group" and that the respondents in this case having an historic identity and a common claim would clearly have met the more exacting requirement of the 1935 bill. But, the bill finally enacted into law, H. R. 4497, 1946, broadened the eligible group still more by substituting the word "identifiable" before "group". Thus, while the 1935 bill described the eligible claimants as "any Indian tribe, band or other communal group", the 1946 Indian Claims Commission Act described the eligible claimants as "any Indian tribe, band or other

identifiable group". In short, the claimant group which is eligible to file before the Indian Claims Commission need only be identifiable and have a common claim. The Court of Claims found as a matter of fact and law that the respondents possess both of these characteristics.

D. The Court of Claims Was Correct in Holding That the Original Creek Nation, as it Existed in 1814, is the Tribal Entity Entitled to Recover for the 1814 Injury and That the Right to Participate in Its Recovery Descends to Lineal Descendants of Its Then Members, and Not Merely to Those Descendants Placed on the Rolls of Petitioner "The Creek Nation" in Oklahoma in 1907.

We have shown above that the Creek Indians now living in Oklahoma or who were living there in 1907 are not and were not the Creek nation of Indians as it existed in 1814. Petitioners agree and assert that it is the Creek nation of 1814 which was wronged by the United States and entitled to recover redress for the wrong. They claim that they are such nation. If we are correct in pointing out that this is a question of fact which the Court of Claims has properly decided against the petitioners and the petitioners cannot, therefore, claim that they are the generic Creek nation of 1814, then they are put to the hard necessity of claiming that they alone, of all the living descendants of the real Creek nation of 1814, are entitled to sue and recover for the wrong done the Creek nation of 1814.

This is obviously an untenable position as the Court of Claims held.

After pointing out that the entity, the wrong to which is the subject of this action, was the real Creek nation of 1814, that that nation no longer existed and that the Creek Indians now living in Oklahoma were not the Creek nation of 1814, the court said:

> "The maintenance or lack of maintenance of tribal relations and the occurrence or non-occurrence of acts of recognition of a tribal organization of the Creek

> Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814. Any claim for an injury to the Creek Nation of 1814, is a claim belonging, if at all, to the descendants of all the members of that Nation whether they live east or west of the Mississippi, whether organized or not, recognized or not, subsequent to that date.
>
> "We can conceive of no valid reason for holding that the claim for the wrong to the Creek Nation in 1814 descended only to those descendants who emigrated thereafter to Oklahoma and set up a new tribal organization. Nor can we see how the failure of the Creeks remaining east to maintain a tribal organization, cures the injury done to them as members of the Creek Nation of 1814." (R. 105)

Why would Congress have purposed to give redress to some identifiable groups of descendants of the Creek Indians sustaining an injury by the United States in 1814 and not give the same redress to others? While it may be apt to attribute to human nature in the Creeks living in Oklahoma the desire to get for themselves all the money our country justly owes to all the identifiable groups of living Creeks it is hardly to be believed that the Congress, which cast such laudable purpose into this Act, shared such sentiments.

2. This Case was Correctly Decided by the Court of Claims.

A. THE INDIAN CLAIMS COMMISSION ACT OF 1946 IS CLEARLY A REMEDIAL STATUTE WITH A CLEAR INTENT AND PURPOSE OF CONGRESS TO GIVE REDRESS, AS FAR AS IT NOW CAN TO INDIANS THE GOVERNMENT MAY PREVIOUSLY HAVE WRONGED AND THUS TO PURGE THE COUNTRY'S CONSCIENCE OF THE GUILT OF OTHER THAN FAIR AND HONORABLE DEALINGS WITH THESE FIRST AND UNFORTUNATE AMERICANS.

Nothing is to be gained by retracing the sad story of our relations with the Indians of this country. We can derive

satisfaction from the compassion Congress has at long last been moved to display toward our Indians.

The design and purpose of the Indian Claims Commission Act of 1946 is well set out in the report of Representative Jackson from the Committee on Indian Affairs in the House of Representatives, recommending the passage of this legislation.

For the Committee Representative Jackson said:

> "The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. This is an integral part of the American system of justice under which the humblest citizen and the highest official are equal before the law. The only American citizen today who is denied such recourse to the courts is the Indian. By virtue of a statute adopted on March 3, 1863, at a time when a good many Indian tribes were engaged in hostilities against the Federal Government, all claims against the United States growing out of Indian treaties were barred from the jurisdiction of the Court of Claims, and from that day to this no Indians have been able to bring their disputes with the Federal Government before the Court of Claims without a special act of Congress permitting them to receive the hearing that it is the right of every other American citizen to demand without special legislation. This lingering discrimination, which arose at a time when Indians were not citizens and were commonly regarded as a hostile or inferior people, is felt today as a badge of shame by some 400,000 of our Indian citizens who, during the war, have contributed voluntarily to the service of the Nation in a measure far out of proportion to their numbers in population who have won an amazing number of decorations for military valor and sacrifice, and who have contributed to our war bond drives in

a measure wholly disproportionate to their limited economic resources.

"At the end of the First World War the patriotism of the American Indian was recognized by the Congress in legislation which granted all Indians citizenship. It is only fitting that at the end of World War II the devotion and patriotism of our Indian citizens be recognized by abolishing the last serious discrimination with which they are burdened in their dealings with the Federal Government and by giving them a full and untrammeled right to have their grievances heard under nondiscriminatory conditions by the appropriate courts of the United States.

"That, in brief, is the primary objective of H. R. 4497. It is difficult to see how any American who is attached to the ideal of a government of laws can quarrel with that objective. Certainly no American can consistently voice concern over the denial of democratic rights to various minorities abroad so long as our own oldest national minority is denied the day in court which is freely accorded to other citizens."

* * * * * * * * * * *

"It is advisable, however, to set up a Claims Commission at the outset so that the facts underlying the backlog of cases that have accumulated during the 82 years in which Indians have been denied free and equal access to the courts can be expeditiously determined. The reference of these cases to referees or commissioners separately appointed by the Court of Claims for each case would be a costly and time-consuming procedure. A wholesale examination of all the facts in all these cases by an impartial fact-finding commission set up for this special task would, in the judgment of all who have studied the problem, expedite its final solution". (By Representative Jackson, Report No. 1466, House of Representatives, 79th Congress, First Session pages 1, 2, 3)

Such a statute is by the well settled decisions of this Court and the other courts of this country to be liberally construed so as fairly to carry out the equitable intent of Congress.

In *Ross* vs. *Doe ex dem. Barland, et al.*, 1 Peters 655, 7 L. Ed. 307 (1828), the Court had before it for construction an Act of Congress of 1803 providing:

> "That to every person, or to the legal representative or representatives of every person who, either being the head of a family or of 20-1 years of age, did, on that day of the year of 1797, when the Mississippi Territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, etc., the said tract of land thus inhabited and cultivated shall be granted; * * * " (7 L. Ed. 307)

The plaintiff in an ejectment suit in the Circuit Court of Mississippi claimed under a certificate of a duly authorized Board of Commissioners under the Act of Congress certifying that the plaintiff's lessor was entitled to a patent because he was in occupancy of the land in question on the 30th day of March 1798, the date of the final evacuation of the territory by the Spanish. A patent subsequently issued to plaintiff's lessor upon this certificate. A previous patent had issued, however, to the defendant's lessor at a sale of the lands claimed to have been authorized on the ground that there was no legal occupancy and acquisition of title to the lands in 1797 because the Spanish did not evacuate the territory until 1798. Upon a writ of error to the Supreme Court of Mississippi which affirmed the judgment of the lower court for the plaintiff therein, this Court affirmed the judgment of the Supreme Court of Mississippi.

Mr. Justice Trimble delivered the opinion of the Court in the course of which he said:

> "The objection, that the occupancy is stated to be on the 30th of March *1798*, produces more difficulty.
>
> "The language of the second section of the Act of Congress authorizing these donation claims, is, that the persons, who on that day of the year *1797*, when the Mississippi Territory was finally evacuated by the Spanish troops, etc.

"This language is very peculiar, and shows plainly that, although Congress at the time of passing the law was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

"The law was intended to confer a bounty on a numerous class of individuals; and in construing the ambiguous words of the section, it is the duty of the Court to adopt that construction which will best effect the liberal intentions of the Legislature." (70 L. Ed. 307) (1828) (italics ours).

In *United States* vs. *Southern Pacific Railroad Co., et al.*, 184 U. S. 49, 22 S. Ct. 285 (1901), the United States brought suit to acquire title to certain lands previously granted to the Southern Pacific Railroad, the title of which had been held void. The defendants in the District Court claimed title to the lands as against the United States under an Act of Congress protecting bona fide purchasers from railroad companies even with titles. The United States alleged that the claimants were not bona fide purchasers because they had notice that the government was asserting that the title of the railroad company was void and was taking steps to reclaim the land. This Court affirmed the decision of the Circuit Court in confirming the title of the claimants and holding them bona fide purchasers in spite of the notice of the government's position.

Speaking for the Court, Mr. Justice Brewer said:

"Further, it must be borne in mind that this is a remedial statute, and is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed; and the mere date of the transaction between the purchaser and the railroad company is not of itself vital in determining whether there is or is not an equity in behalf of the purchaser.

"As said in Potter's Dwarris on Statutes, 231; 'a remedial act shall be so construed as most effectively to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial stat-

> ute ought to be construed liberally. Receiving an equitable, or rather a benignant, interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said the construction made is contrary to the letter; which should be read, ultra the letter, and confined to ancient statutes.' " (U. S. *vs.* P. R. Co., 184 U. S. 49, 56, 22 S. Ct 285, 288 (1901)).

And, again speaking for the Court in *Gertgens* vs. *O'Connor*, 191 U. S. 237, 242, 243; 24 S. Ct. 94, 97 (1903), in construing an Act of Congress giving a preferred right to acquire government lands to "bona fide purchasers" from a railway company, this Court held one to come within the terms of this Act who had made no payment for the land, had made no absolute promise to pay, and giving the statute a liberal construction, said:

> "Ireland had made no payment for this land, had made no absolute promise to pay, and it was optional with him whether he took the land or not. And if it be a condition of acquiring a right under this section, that the party claiming must either have paid or promised to pay, then Ireland was not entitled to any benefits therefrom. But we think the section does not compel such construction. We have more than once held that the entire statute was remedial in its nature, and must be construed so as to carry out the intent of Congress, and secure to the parties the intended relief. Primarily, the purpose was to secure an adjustment of the various land grants in aid of railroads. Much confusion had existed in the construction and administration of those grants. There had been conflicting decisions, and Congress attempted, without displacing vested rights, to do equity to all parties claiming interests in lands within these various grants".

Likewise in *Beley, et al.* vs. *Naphtaly*, 169 U. S. 353, 18 S. Ct. 354 (1898), the plaintiff below brought an action in the Circuit Court of the United States for the Northern District of California claiming title and the right to pos-

session of certain lands under a United States patent predicated upon his compliance with an Act of Congress of 1866 which gave rights to bona fide purchasers of lands "of Mexican grantees" whose grants were subsequently rejected. The defendant below denied the plaintiff's claim on the ground that plaintiff was not a bona fide purchaser from "Mexican grantees" because the party from whom plaintiff bought his lands had never received a grant from the Mexican government. This Court affirmed the United States Circuit Court of Appeals for the Ninth Circuit which held that the plaintiff had complied with the intent and general purpose of the Act of Congress.

Mr. Justice Peckham (*Beley* vs. *Naphtaly*, 169 U. S. 353, 18 S. Ct. 354, 356 (1898) said:

> "Construing the Act of Congress of 1866 under the circumstances above outlined, and in view of the general rules of construction already stated, we hold that the provisions of the seventh section of that act include such a case as this. The purpose of the Act is to quiet titles in California, and, as stated by the court below, it is a remedial statute, and one entitled to a liberal construction, in order to effect a purpose and object of its enactment. When the act, therefore, speaks of bona fide purchasers for a valuable consideration of lands from Mexican grantees or assigns, which grants have subsequently been rejected, we do not think that the words 'grantees' and 'grants' should have such a rigid and technical construction as to require the actual existence of a formal grant from the government of Mexico, but we are of opinion the act should be construed in accordance with what we conceive to have been its plain purpose, which was to cover the case of those persons who in good faith and for a valuable consideration have purchased lands (and taken and retained their possession) from those who claimed and were supposed to be Mexican grantees, but whose claims had been subsequently rejected. Otherwise, it seems to us clear that the purpose for which this seventh section was passed would be so circumscribed as to reduce to much narrower limits than the known mischief to be remedied called for."

And again, in *United States* vs. *Fitzpatrick, et al.*, 80 U. S. 568, 20 L. Ed. 707 (1872), this Court had before it from the Court of Claims awards made by that court to certain employees of the United States, claiming under a joint resolution of Congress additional pay to certain persons in the "civil service". As this Court pointed out an attempt was made by the government to restrict the meaning of the term "civil service" so as to exclude all persons from the benefits of the provision except such as had been appointed to office or held appointments of some kind in that service.

This Court, holding that the claimants who were employees in the Executive Mansion or in departments of the government or in the Office of Commissioner of Public Buildings came within the terms of the resolution and affirmed the award the Court of Claims made to them. The Court, through Mr. Justice Clifford, (*U. S.* vs. *Fitzpatrick, et al.*, 80 U. S. 568, 20 L. Ed. 707 (1872), said:

> "Beyond doubt, those words were intended to contradistinguish the service described from that of the military or naval service, but the Court is unable to concur in the proposition that they were also intended to restrict the operation of the resolution to persons in office in the civil service, or to persons holding appointments in that service as salaried officers.
>
> "Certain described persons and classes of persons are plainly entitled to the benefit of the provision, whether regarded as officers or mere employees—"

Further in *U. S. Use of Hill* vs. *American Surety Company, supra*, this Court upheld the liability of a surety company to plaintiffs who furnished labor to a sub-contractor upon a government contract notwithstanding that the bond of the surety company, pursuant to an Act of Congress, by its terms covered only persons supplying labor or materials to the contractor.

Supporting its decision, the Court, through Mr. Justice Day, laid down clearly the salutary rule for the construction of remedial statutes:

> "Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *U. S.* vs. *Freeman,* 3 How. 556, 11 L. Ed. 724. 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' *Chief Justice Marshall in Durousseau* vs. *United States,* 6 Cranch, 308, 3 L. Ed. 232)". (*United States Use of Hill* vs. *American Surety Company,* 200 U. S. 197, 26 S. Ct. 168, 170 (1905).

This Court applied the same rule in construing "The Soldiers and Sailors Civil Relief Act".

Speaking for the Court, Mr. Justice Jackson said:

> "The Soldiers and Sailors Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." (*Boone* vs. *Lightner, et al.,* 319 U. S. 550, 63 S. Ct. 1223 (1943).

Furthermore, having before it the Selective Training and Service Act of 1940, this Court said:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." (Per Mr. Justice Douglas *Fishgold* vs. *Sullivan Dry Dock & Repair Corp.,* 328 U. S. 275, 66 S. Ct. 1105, 1111 (1946).

See also *Logan* vs. *Davis,* 233 U. S. 613, 34 S. Ct. 685 (1913); *Marriott, et al.* vs. *National Mut. Cas. Co., et al.,* 195 Fed. 2d 462 (1952); *Binkley Mining Co. of Missouri* vs. *Wheeler,* 132 Fed. 2d 863 (1943); *Application of Field,* 190 Fed. 2d 268 (1951); *White* vs. *U. S.,* 102 F. Supp. 585 (1952).

And this rule of liberal construction of remedial statutes applies also when the subject statute is an Act of Congress allowing suit against the United States.

In *Becker Steel Company of America* vs. *Cummings,* 296 U. S. 74, 56 S. Ct. 15 (1935), a suit was brought against the Attorney General as Alien Property Custodian, and the Treasurer of the United States, in the District Court for the Southern District of New York under Section 9 of the Trading With the Enemy Act, to recover a balance of the proceeds of certain shares of stock seized and sold by the Alien Property Custodian. The lower court decided that such a suit could be maintained only when the Alien Property Custodian or the Treasurer "held" the seized property and the suit could not lie in this case because the property seized had been disposed of.

This court reversed the holding of the lower court and held the suit would lie.

Mr. Justice Stone speaking for the Court and giving a liberal construction to this remedial statute said:

> "Only compelling language in Congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution." (*Becker Steel Company of America* vs. *Cummings,* 296 U. S. 74, 80, 56 S. Ct. 15, 18 (1935).

One of the cases relied upon by this Court in *Becker Steel Company of America* vs. *Cummings* was *Lynch* vs. *United States* (292 U. S. 571, 54 S. Ct. 840 (1931). In this case the question before this Court was whether Congress, as part of an economy measure, had taken away the legal remedy from beneficiaries of certain War Risk Insurance policies, as held by the court below. Liberally construing the Act to give the maximum protection to the policyholders, the deserving class to be protected by the War Risk Insurance Acts, this Court reversed the lower court which held that the language of the Act of Congress took away the legal remedy from the beneficiaries of the policyholders in question.

Mr. Justice Brandeis, for the Court, said:

> "But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly reviewable term policies if it had realized that these had contractural rights." (*Lynch* vs. *United States*, 292 U. S. 571, 587, 54 S. Ct. 840, 847 (1931).

Another case relied upon by this Court in *Becker Steel Company* vs. *Cummings* is *Russian Volunteer Fleet* vs. *United States*, 282 U. S. 481, 51 S. Ct. 229 (1931). In this case a Russian corporation brought suit against the United States in the Court of Claims for compensation for our government's requisition of contracts for constructing ships in the United States, under an Act of Congress requiring the United States to make just compensation for requisition of ships and giving the claimant the right to bring suit against the United States. The United States resisted this claim on the ground that this Act did not give protection to this particular claimant because the Government of Russia, then in power, had not been recognized by the United States and Russia did not accord the citizens of the United States the right to prosecute such claims against its government in its courts. This Court, notwithstanding these facts, held that the claimant could recover because his property had been taken by the United States without compensation and he should be paid for it.

In the case of *Behn, Meyer & Co., Ltd.*, vs. *Miller, Alien Property Custodian, et al.*, 266 U. S. 457, 45 S. Ct. 165 (1925), a corporation of a British Crown colony was doing business in the Philippine Islands at the beginning of World War I. The Alien Property Custodian of the United States, claiming authority under the Trading With the Enemy Act, seized and converted into cash the corporation's assets found in those islands. The corporation brought suit in the District of Columbia against the United States under the provision of the Trading With the Enemy

Act, providing for recovery of property so seized by one "not an enemy or ally of enemy" of our country. The United States asserted that the plaintiff corporation could not recover because its stock was owned principally by alien enemies. The court below held with the United States. This Court reversed the decision giving a liberal construction to the remedial act designed to give fair consideration to those whose property was seized.

As against these unanswerable precedents of this Court giving a liberal construction to remedial statutes so as to carry out the high intent of Congress even when providing for suit against the United States, it is surprising that petitioners, and especially in view of the broad language and manifest purpose of the Indian Claims Commission Act, so strenuously contended before the Commission, the Court of Claims, and now contend before this Court, that the respondents being numerous provable, lineal descendants of members of the Creek nation of 1814 should not even have the right to be heard upon their claim by the Indian Claims Commission.

The broad scope which the Indian Claims Commission Act was intended to have by the Congress is clearly set out in the following language of Representative Jackson reporting the bill, later becoming the Act, from the Committee on Indian Affairs of the House of Representatives. Mr. Jackson said:

> "In order that the decisions reached under the proposed legislation shall have finality, it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts." (Report No. 1466, 79th Congress, First Session, House of Representatives, recommending the bill which became the Indian Claims Commission Act.)

Surely there is as much equity against the United States for the wrong of 1814 in favor of the respondents and their principals as on the part of the Creeks living in Oklahoma; so that the settled rule of liberal construction of remedial statutes would lead this Court to permit fair redress to all the Creeks equitably entitled to it if the Court can find such an intent to speak clearly through the verbage of the Act.

B. The Indian Claims Commission Act Requires Only That the Indian Claimant be an "Identifiable Group" and That the Members of the Group Have "a Common Claim."

As we have previously pointed out, the group wronged in this case was the Creek nation of 1814. It is an "identifiable group" as the Court of Claims has found and as numerous treaties and the history of the period, of which this Court will take judicial notice, affirm. Respondents are members of the identifiable group who are the provable, lineal descendants of that group entity, the Creek Nation of 1814, to which was done the wrong which is the basis of this action. The respondents sue here as the representatives of the identifiable group, the Creek nation of 1814. And, as the Court of Claims held, the respondents, because they are representing the common group, the Creek nation of 1814, and claim through it, have "a common claim."

In short, as the Court of Claims properly held, it is really the Creek nation of 1814 suing through its representatives authorized to sue by the statute. These respondents have as much a common claim as the real Creek nation, if it existed today and sued under the Act, would have. (Opinion of the Ct. Cls., R. 104, 105)

The requirements of the Act to make it workable that the groups suing must be identifiable and that Indians who sue together must have common claims have been met by the respondents in this case and the Court of Claims

correctly held that the Commission was in error in holding that the claim of the respondents was not "a common claim."

The Court of Claims holding that the respondents in this case are an "identifiable group" said:

> "The Creek Nation East of the Mississippi which appellants represent is, in our opinion, an 'identifiable group' within the meaning of Sec. 2, of the Indian Claims Commission Act; that is, this group can be identified at this time as a group of Indians consisting of the descendants of a portion of the Creek Nation as it existed in 1814. To identify is to establish the identity of, and if a group presenting a claim under the Act is capable of being identified as a group of Indians consisting of the descendants of members of the tribes or bands which existed at the time the claim arose, the jurisdictional requirements of the statute, in our opinion, have been met. It would, we think, be a strained and unwarranted interpretation of the Act to say that Congress intended by the term 'identifiable group' that the group making the claim must be identical, and a distinct entity, with a tribe or band existing at the time the claim arose. Such interpretation would make the term 'identifiable group' mean nothing more than a recognized tribe or band" * * * (R. 109).

The portion of the opinion of the Court of Claims where the common nature and character of the claim of respondents is set out, is as follows:

> "The injury complained of by the petitioner-appellee which is an organized tribe, and by appellants who, until recently, were unorganized, was an injury to a tribal or group right. In 1814 the land said to have been taken by the United States, under the treaty, was tribal property. The Commission has ruled, and this court has always taken the view, that a claim for the taking of tribal lands is a common claim, the ownership of the land being tribal and not individual. It is the nature of the ownership of the land at the time taken that determines the character of the claim arising from that taking. If the ownership was in individual members of the tribe in 1814, and the injury

> thus to those individuals, the later forming of a tribal organization to include such members or their descendants would not transform individual claims into a common claim or the individual injury into a common one. On the other hand, if the claim when it arose was a tribal or common one, the later disbanding of the entire tribe and the complete absence of a tribal organization as a political entity at the time of suit on the old tribal claim, would not affect the character of the claim as a tribal claim. In the instant case, a portion of the membership of the 1814 tribe banded together in a separate political organization *after* the injury to the tribal property occurred, and the remaining members of the 1814 tribe abandoned all tribal organization and became United States citizens. These circumstances did not, we think, alter the tribal or common nature of the injury or the claim therefrom." (R. 110)

In its decision in this case, the Court of Claims was simply following its previous decision rendered in 1905 and affirmed by this Court in 1906, the *Cherokee Nation* vs. *The United States,* 40 Ct. Cls. 252; affirmed 202 U. S. 101, 26 S. Ct. 588 (1906).

In the *Cherokee Nation* vs. *The United States,* 40 Ct. Cls. 252 (1905), the Court of Claims by Congress had been vested with the following authority:

> "Jurisdiction is hereby conferred upon the Court of Claims to examine, consider and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act;" * * * (26 S. Ct. 589 (1905)).

Under this Act, the question arose as to whether a portion of the Cherokee Nation living east of the Mississippi, the part which had not migrated west of the Mississippi,

could maintain a claim against the United States for a portion of funds due the Cherokee Nation by the United States.

The Court of Claims held that the Cherokees east of the Mississippi could recover a share of these funds. The pertinent language in the Court of Claims in that case quoted by the Court of Claims in the present case (R. 105, 106) is as follows:

> "The contracting party here, being also the party who made the conveyance of the Cherokee Outlet, was the Cherokee Nation; and if the lands of the Cherokees were, like the lands of the United States, Government lands, or public lands in which the Government has the sole proprietary interest, and in which no individual has any personal interest whatever, there could not be a doubt of the exclusive right of the Cherokee Nation to have a judgment awarded in its name. But in 1835 the lands of the Cherokees east of the Mississippi, and in 1846 the lands of the Cherokees in the Indian Territory, were neither public nor private lands in the ordinary sense of those terms. The term 'communal', it is believed, is not to be found in treaties or statutes or public documents relating to the Indians prior to the date of the case of the *Western Cherokees* (27 C. Cls. R., 1). But the officers of the Government, under stress of circumstances—that is to say, the expectations of the Indians—have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. * * *
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> "While the United States have always, or nearly always treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case the negotiations have been with representatives of the owners. The chiefs and headmen have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money.

They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and headmen of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their Government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita* * * *

* * * * * * * * * * *

"The persons to whom distribution of this fund of $1,111,284.70, with accrued interest, would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and the Eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows necessarily that each and all of the present communal owners, whether on the east or the west of the Mississippi, and whether the descendants of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount *per capita*." (R. 105, 106, 107) 40 Ct. Cls. 252, 325.

This Court in affirming this decision of the Court of Claims quoted literally with its approval a large part of the above quotation of the Court of Claims. (Per Mr. Chief Justice Fuller, 26 S. Ct. 599, 600 (1906)).

Mr. Chief Justice Fuller added the following words for this Court:

> "The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation and the nation properly made no distinction when parting with the Outlet, but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the nonfulfilment of the treaty of New Echota. As to these Eastern nonresident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.
>
> "After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners." (*U. S.* vs. *Cherokee Nation,* 26 S. Ct. 600 (1906)).

In the same opinion, this Court dealt with another band of the Eastern Cherokees and upheld their right to recover also because of a wrong done to the Cherokee Nation when it was an existing entity, members of which were ancestors of the band in question.

The Court said:

> "The Eastern and Emigrant Cherokees, in respect to whom it is stated in their petition 'that they number about 4,500 persons, more or less, all Eastern Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay, and Macon counties, North Carolina, some in north Georgia, northern Alabama and eastern Tennessee, together with about 1,500 emigrants, portions of their various families, gone West, nearly all of whom have been recognized as citizens, and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names, or those of whose ancestors, may be found on the rolls of 1835 and 1838,'

> asked that one-fourth part of the whole sum recovered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cherokees, and should obtain that payment accordingly." (Per Mr. Chief Justice Fuller, *U. S.* vs. *Cherokee Nation*, 202 US 101, 26 S. Ct. 588, 601 (1906)).

In U. S. vs. *Cherokee Nation* referred to, both the Court of Claims and this Court laid down two basic principles. The first was that the critical date and period is the period when the wrong complained of was done. It is the character of the victim of the wrong which determines subsequently the character of the claimant and the nature of the claim. That is, if the wrong were done to an Indian nation later the descendants as the representatives of that nation could sue for the wrong, under proper legislative authority, and the claim would be a group claim, or "a common claim." The second principle established was that the Court would try to reach a conclusion in such a matter as would be equitable for all the Indian claimants, taking into account all the facts and circumstances to do so.

Petitioners seek to distinguish *U. S.* vs. *Cherokee Nation* upon the narrow grounds of some restrictive language in the treaties involved in that case. But the Court of Claims in its opinion in that case and in its quotation of it in this case, and this Court itself in its opinion in that case made it clear that the opinion did not turn upon some peculiar language in the treaties involved but upon the whole broad aspect and equity of the case.

And *U. S.* vs *Cherokee Nation, supra,* stands today. Petitioners try to avoid the effect of *U. S.* vs. *Cherokee Nation* by citing *Eastern Band of the Cherokee Indians* vs. *U. S.*, (117 U. S. 288). This case was decided by this Court in 1886 twenty years before *U. S.* vs. *Cherokee Nation, supra.* Moreover, in that case the funds in issue claimed by unorganized Eastern Cherokees were derived not from

the sale of lands of the whole and original Cherokee Nation dwelling east of the Mississippi, but from the sale of lands in Oklahoma which the migrating Cherokees had settled and from commutation of annuities granted in exchange for the surrender of those Oklahoma lands. Of course, the Eastern Cherokees were not entitled to a share in those funds.

In *Red Lake, Pembina and White Earth Bands*, Ind. Cl. Com. Docket No. 18-A (September 17, 1951), the Indian Claims Commission adopted the very principles for which we are contending here. In that case, a suit was brought against the United States before the Indian Claims Commission under the Indian Claims Commission Act of 1946 "by individual members, or descendants of members, of the Pembina Band, a group of Chippewa Indians which was a party to the 1863 treaty cession of lands, out of which the claim in question arose, asserting that they were "acting as the representatives of all the members or descendants of members of said band". (R. 111). The Pembina Indians had been an organized band recognized by the United States as such at the time of the 1863 treaty complained of. The Pembina Indians no longer existed as an organized band and the claimants in the suit had actually joined some other Indian bands and were members of such bands at the time they filed the claim. Yet, the Indian Claims Commission correctly held in that case that the claimants were an "identifiable group" and that they had "a common claim."

The Court of Claims in this case quoted with approval the following language from the decision of the Indian Claims Commission:

> • • • "claimants who are permitted to assert claims under the Indian Claims Commission Act, namely, a 'tribe, band, or other identifiable group' do not have to be existing political groups in order to be heard by the Commission. The controlling question is whether

the claimant group can be identified and have a common claim. * * *

"As the plaintiffs concede that the Pembina Indians are no longer organized as a band, the question then is whether members, or descendants of members of the Pembina Band as it existed and was recognized at the time of the 1863 treaty, can be identified. If they can be so identified, then any one of their group is authorized by express statute to present this claim as a representative of all the members, as provided by Section 10 of the Indian Claims Commission Act (25 U. S. C. 70a), which provides that: 'any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representatives of all its members'.

"We believe that it is such a representative action that is presented here. It is true that in the caption of the petition the Pembina Band is named as one of the plaintiff bands, which would indicate that the claim was presented by an existing organized band; however, the allegations of the petition clearly show that this claim is presented by individual members, or descendants of members, of the Pembina Band or Group of Chippewa Indians which was a party to the 1863 treaty cession of lands, out of which this claim arises, and that they are acting as the representatives of all the members or descendants of members of said band." (R. 111)

The situation of respondents is exactly analogous to this. Admittedly the Creek nation did exist as a recognized organized "tribe, band or other identifiable group" in 1814. The respondents are the provable, lineal descendants of members of that Creek nation of 1814. Respondents' claim is a result of the wrong done the Creek nation of 1814. Respondents are identifiable as a group of such descendants. And respondents under the authority of the statute sue as representatives of the group.

Since the *Pembina* case was decided by the Indian Claims Commission September 17, 1951, something over three

months after it denied the petition of respondents to intervene and thereby rejected exactly the sort of claim it received from the Pembina Indians in a separate suit, it may be assumed that the Commission seeing the true character of such a claim as was presented by respondents more clearly when presented as an independent claim, and perhaps having had further opportunity to reflect upon the matter, determined that such a claim should lie and favorably acted upon it.

C. The Rights of Those in the Position of Respondents Were Expressly Saved and Guaranteed by the Act of February 8, 1887 (24 Stat. 390, as amended March 3, 1901, 31 Stat. 1447) and May 8, 1906 (34 Stat. 182).

The language of the 1906 Act is as follows:

> "Every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, *whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.*" (Italics ours)

In discussing this statute and the general trend of government policy toward the Indians and Indian tribes, the Court of Appeals of the District of Columbia in *United State ex rel. Besaw* v. *Work*, 6 F. 2d 694, 698 (1925), quoting with approval from *Oakes* v. *United States*, 172 F. 305 (C. C. A. 8th, 1909), said:

"On this point the court said: 'For many years the treaties and legislation relating to the Indians proceeded largely upon the theory that the welfare of both the Indians and the Whites required that the former be kept in tribal communities separated from the latter, and while that policy prevailed, effect was given to the original rule respecting the right to share in tribal property; but Congress later adopted the policy of encouraging individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life, and, as an incident to this change in policy, statutes were enacted declaring that the right to share in tribal property should not be impaired or affected by such a severance of tribal relations, whether occurring theretofore or thereafter.'

"After citing and quoting from a number of the acts of Congress, the court said: 'These acts disclose a settled and persistent purpose on the part of Congress so to broaden the original rule respecting the right to share in tribal property as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations. Not only this, but these acts, omitting that of 1865, are general and continuing in their nature, and therefore are as applicable to the Chippewas in Minnesota as to other Indians, unless the act of 1889 discloses, either expressly or by necessary implication, that Congress intended otherwise. In our opinion that act does not thus disclose such an intention.' "

* * * * * * * * * * *

"Confusion seems to have arisen through failure to distinguish between membership in an Indian tribe and the mere severance of tribal relations. The breaking or severance of tribal relations occurs where a member of the tribe abandons the tribal life, removes from the tribal habitation, and by marriage, exercise of the homestead right, or otherwise, establishes a residence elsewhere and adopts the habits and customs of civilized life. But membership in an Indian tribe is based upon the firm foundation of right by blood inherited from Indian ancestry.

"Nor is the test one of citizenship. In the absence of a treaty or an act of Congress conferring citizenship upon Indians, who already had, or who would in the future, abandon tribal life and adopt the habits and customs of civilized life, expressly reserved to such Indians all their rights in tribal property held in common for the benefit of the membership of the tribe. Hence the mere transfer of citizenship is not important, so far as the question of the rights in tribal property is concerned. * * *"

Thus the respondents, as an identifiable group of descendants of the Creek nation of 1814 wronged by the United States, have a right to present a common claim for the redress of that wrong and to share in the recovery which may be had and the Creek Indians living in Oklahoma have a similar, but not an exclusive right, to present their common claim and to share in any recovery which may be had. Since the so-called "The Creek Nation" of Oklahoma before the Indian Claims Commission, vigorously asserted that they had the exclusive right to present the claim of the Creek nation and the exclusive right to enjoy the proceeds of the suit, if any, and assumed a position antagonistic to that of the respondents, the respondents would be excluded altogether from any consideration in the case unless they were permitted, as the Court of Claims held they should have been, to intervene in the case.

D. The Respondents Being An "Identifiable Group" and Having "a Common Claim" Came Within the Terms of the Indian Claims Commission Act and Were Entitled to be Heard by the Indian Claims Commission and in This Case, Having An Interest in the Subject of the Suit by "The Creek Nation" of Oklahoma, Should Have Been Permitted to Intervene as Held by the Court of Claims.

As we have pointed out above, the Indian Claims Commission really decided this case against respondents on the merits. That is, the Commission received respond-

ents' petition, entertained and considered it, and as a final determination rejected it holding that respondents are not members of a "tribe, band or other identifiable group" within the meaning of the Indian Claims Commission Act because they do not have a "common claim"; that the Creek Indians in Oklahoma styled "The Creek Nation" have the exclusive right to prosecute the claim for the 1814 injury to the Creek nation; and the jurisdiction of the Commission does not extend to defining identity of the group entitled to recover on any claim placed before it. It appears, therefore, that the Commission would have ruled the same way upon respondents' claim had it been presented as a separate and distinct claim instead of a petition for intervention. The Court of Claims regarded this action of the Commission as a final determination of the case respecting respondents by entertaining the appeal of respondents.

While there appears less certainty on the point in the petition of the United States, yet both petitioners in this case say first, that respondents should not have been heard by the Commission because the Commission had no power to permit them to intervene; and second, respondents should not have been heard by the Commission as intervenors because they shouldn't be heard at all.

The substantive affirmative right of the respondents to be heard by the Indian Claims Commission as an "identifiable group" of Creek Indians having "a common claim" against the United States, under the remedial Indian Claims Commission Act of 1946, we have already presented. If that substantive right does exist in the respondents, to deny the respondents the opportunity to be heard in this case involving the 1814 treaty presented by the Creek Indians in Oklahoma calling themselves "The Creek Nation" is to put the Indian Claims Commission Act and the Indian Claims Commission in a procedural straitjacket. As pointed out, Section 17 of the Act provides:

"The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim".

The Court of Claims held that respondents should have been permitted to intervene before the Indian Claims Commission in the following clear language:

"Accepting as true the allegation of appellants that they represent the descendants of those members of the Creek Nation in 1814 who remained east of the Mississippi River, it would appear to be both proper and necessary that the eastern group be allowed to intervene by their representatives in order that all those who may be legally entitled to share in a possible recovery for the injury to their common ancestors, be before the Commission. A continuous integrated process of litigation is greatly to be desired in settling these Indian claims, and the allowance of the intervention by a group who claims an interest in the judgment or who will be adversely affected by its disposition, is one of the steps in the attainment of this objective. As a matter of justice, and to bring about a thorough administration of the law laid down by the Indian Claims Commission Act, we think that where all interested persons have not been made party to the proceedings by joining in the original petition, the Commission has full power to allow such persons, constituting an identifiable group of Indians, such as we have here, to intervene or be made parties regardless of the lack of specific language to that effect in the Act, or the failure of the Commission to formulate rules relating to intervention." (R. 112)

The Act, taken together, clearly shows the Congressional purpose that Indian claims should all be heard, when presented by an "identifiable group" having "a common claim", and all disposed of as expeditiously as possible. The gain to the Commission as well as to the parties claiming the right to intervene is well illustrated in this case. When the respondents filed their petition to intervene, the claim of "The Creek Nation" of Oklahoma had been pre-

sented; a trial of the issues on the merits of that claim had been held; arguments had been heard and the issues were in the bosom of the Commission for decision. The respondents pointed out in their petition for leave to intervene that they did not wish to prolong or to disturb what had already been done in the case; that the issue of liability already made by "The Creek Nation" of Oklahoma was the same issue which respondents would present if they filed as separate claimants and the respondents sought to adopt as applicable to their own claim the evidence which had previously been taken and the arguments made in support of liability. All the time required for the trial of the issues on the claim of "The Creek Nation" of Oklahoma would have to be repeated, arguments already made in support of the claim of "The Creek Nation" would have to be made again if respondents were required to file a separate claim. But if they were permitted to intervene, all this effort already expended and this time already consumed by the Commission as well as the additional time which would be required of the respondents would be saved. And, of course, attendant expense upon these efforts would be avoided.

Surely then the sensible and reasonable course would have been for the Commission to have allowed the respondents, asserting an interest in the claim presented by "The Creek Nation" of Oklahoma, to be heard and their claim to be considered. The Court of Claims so held; and it is clear that the Indian Claims Commission Act in prescribing the general duties of the Commission, in specifically requiring in Section 17 the Commission to hear all interested parties before making any final determination upon any claim, and authorizing the Commission to make its own rules of procedure, authorized and required the Commission to hear the respondents' claim in the case initiated by "The Creek Nation" of Oklahoma.

It is also apparent that Section 20 of the Indian Claims Commission Act giving the Court of Claims, on appeal

from a final determination of the Commission, "exclusive jurisdiction to affirm, modify, or set aside such final determination" empowered the Court of Claims to require the Commission to permit the intervention requested by the respondents. We see no reason why this Court should wish to set aside this authorized decision of the Court of Claims requiring the expeditious, economical and full decision of the Creek Indian claims arising out of the Treaty of 1814, by the Commission.

Moreover, if respondents have merit in their claim, it would be inequitable for the total proceeds of the claim arising from the Treaty of 1814 against the United States to go to the Creek Indians now living in Oklahoma to the exclusion of all others having the same relationship as they to the Creek nation of 1814 and its members. If the theory of petitioners is that "The Creek Nation" of Oklahoma is suing the United States as trustee for all "identifiable groups", their assertions have been just the contrary. They deny that respondents have any claim at all or are entitled to any recovery. They show themselves wholly antagonistic to the claim of the respondents. So, if they were permitted to sue exclusively and recover against the United States, obviously another action against them provoking long litigation would be required on the part of respondents if they derived anything at all from the recovery by "The Creek Nation" of Oklahoma. Therefore, multiplicity of litigation is avoided and the rights of respondents preserved by this Court declining to interfere with the salutary decision of the Court of Claims directing the allowance of respondents' petition for intervention.

It is manifest then that both by statute and on principle in this case respondents should have been permitted to intervene before the Commission.

E. The Indian Claims Commission Act of 1946 Does Not Give the Creek Indians Now Living in Oklahoma Calling Themselves in This Case "The Creek Nation" the Exclusive Right to Bring a Claim Against the United States for the Alleged Wrong to the Real Creek Nation by the Treaty of 1814.

The Court of Claims upon this subject said:

> "The Commission and the appellees appear to take the position that because a tribal organization of Creek Indians does exist which has been recognized by the Secretary of Interior, it must be the representative of all Creek Indians and have the exclusive privilege of presenting any claim for such Indians. The Creek Nation in Oklahoma has only been recognized by the Secretary of Interior as having authority to represent the Creek Indians in Oklahoma. It has never been recognized as having authority to represent the unorganized but identifiable group of Creeks east of the Mississippi, and therefore is not entitled under the Indian Claims Commission Act to the exclusive right of representing such Eastern Creeks. Accordingly, the group of Eastern Creeks are entitled to be represented separately by representatives of their choosing. The legislative history of the Indian Claims Commission Act and the language of the Act itself indicate that it was the intention of Congress to provide for the complete and expeditious settlement of all just and equitable Indian claims, and denial of intervention to the representatives of the descendants of a group constituting a portion of the Creek Nation as it existed in 1814, in a suit involving an injury to that Nation, would defeat such purpose."

The Court of Claims is clearly right. We have already pointed out that the Indian Claims Commission Act required the Commission to hear all interested parties before the final determination of any claim. That assuredly would be required in cases where the original claimant denied that other claimants had any rights to be redressed before the Commission. We have shown that it was the intent

of the Act of 1946 that all identifiable groups of Indians having a common claim should be heard by the Commission.

This is all evident in Section 10 of the Indian Claims Commission Act upon which petitioners so heavily rely to support the exclusive right of "The Creek Nation" of Oklahoma to maintain suit in this case. Section 10 merely provides how unorganized tribes, bands or other identifiable groups of Indians and organized groups may be represented. The section means if a tribe, band or other identifiable group has no tribal organization recognized by the Secretary of Interior as having authority to represent such tribe, band or group, then "any claim within the provisions of (the Act) may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians, as the representative of all its members". But, the Act goes on to set out:

> "* * * wherever any tribal organization exists, recognized by the Secretary of Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission".

Obviously, the Act contemplated that some tribes, bands or groups would have tribal organizations recognized by the Secretary of Interior and some would not. Of course, members of unorganized tribes, bands, or groups could not speak for other tribes, bands, or groups which had tribal organizations recognized by the Secretary of Interior as having authority to represent them. But, by the same token, no tribal organization recognized by the Secretary of Interior as having authority to speak for a given tribe, band, or group would be authorized to speak for anybody else, any other tribe, band, or group not amenable to that tribal organization or tribal authority.

Hence, since, as the Court of Claims held, "For certain limited purposes, the Creek nation West of the Mississippi retained and still maintains a tribal organization."; (R. 104) and, as such limited tribal organization has been recognized by the Secretary of Interior as having authority to speak for those Creek Indians, obviously their tribal organization should present their claim before the Indian Claims Commission instead of some private members of the group presenting it. But, that tribal organization has no authority, and was never recognized by the Secretary of the Interior as having any authority, to speak for any Creek Indians except those living in Oklahoma. Certainly, such tribal organization has no authority, and has never been recognized by the Secretary of the Interior, as having any authority to speak for the respondents.

Thus, the Creek Indians now living in Oklahoma have neither the exclusive right to enjoy whatever may be recovered from the United States for the wrong done the Creek nation in 1814, nor the exclusive right through their limited tribal organization to sue for such redress.

F. The Indian Claims Commission Act Does Not Require That the Respondent-Claimant Group be Either Organized or Recognized by the Secretary of the Interior.

Petitioners insist here, as they did before the Commission and the Court of Claims, that claimant groups must be organized and recognized by the Secretary of the Interior in order to sue before the Indian Claims Commission. The Commission itself did not hold that a claimant group has to be organized. It held that a claimant has to be possessed of a common claim and if it does not have a common claim, it is not an "identifiable group." (R. 91)

The Court of Claims held:

> "The maintenance or lack of maintenance of tribal relations and the occurrence or non-occurrence of acts

of recognition of a tribal organization of the Creek Indians in Oklahoma or east of the Mississippi, subsequent to 1814, would not affect or change what was done to the Creek Nation of 1814." (R. 105)

And again:

"In the instant case, a portion of the membership of the 1814 tribe banded together in a separate political organization *after* the injury to the tribal property occurred, and the remaining members of the 1814 tribe abandoned all tribal organization and became United States citizens. These circumstances did not, we think, alter the tribal or common nature of the injury or the claim therefrom. The further fact that the United States has never recognized by treaty or otherwise the recently formed tribal organization of Eastern Creeks, does not, we think, defeat their right to present a claim to the Indian Claims Commission as an identifiable group, inasmuch as they are seeking to become parties-plaintiff on a common or tribal claim, as representatives of the descendants of a large group of members of a tribe which was recognized by the United States, and the claim arose out of a treaty between such recognized tribe and the United States. If the Eastern Creeks cannot intervene and become parties in the suit on this claim because, as a group, they have never been recognized by or participated in treaties with the United States, since 1832, then it would appear that the Creek Nation west of the Mississippi also would have no standing to sue because, as presently constituted, that nation was not a treaty party in 1814, when the property in question was ceded." (Per Littleton, Judge (R. 110) (Italics ours)

It is apparent from Section 15 of the Act relative to the employment of attorneys that the Congress contemplated that claimants before the Indian Claims Commission under the Act should be organized and unorganized. The following is the language of the Act:

"The attorney or attorneys for any such tribe, band or group as shall have been *organized* pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 987;